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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92054069
Party	Defendant Skydive Arizona, Inc.
Correspondence Address	SKYDIVE ARIZONA INC 4900 N TAYLOR ROAD ELOY, AZ 85231 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
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Signature	/Sid Leach/
Date	07/12/2011
Attachments	Skydive Arizona Motion to Dismiss Cancellation Petition.pdf (14 pages) (182856 bytes) Exhibit A - Summary judgment decision in Skydive Arizona v Mullins case.pdf (35 pages) (1542462 bytes) Exhibit B - Judgment entered in Skydive Arizona v Mullins case.pdf (2 pages) (46022 bytes) Exhibit C - Court decision on damages in Skydive Arizona v Mullins case.pdf (16 pages) (796931 bytes) Exhibit D - Settlement agreement signed by Marc Hogue.pdf (6 pages) (247853 bytes) Exhibit E - Mike Mullins deposition.pdf (52 pages) (122736 bytes) Exhibit F - Marc Hogue deposition.pdf (100 pages) (217694 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Registration No. 3,099,847 (Application Serial No. 76/641,146)

MARK: **SKYDIVE ARIZONA**

Registered on the Principal Register on June 6, 2006

Marc Hogue,

Petitioner,

vs.

Skydive Arizona, Inc.,

Respondent.

Cancellation No.: 92/054,069

**SKYDIVE ARIZONA’S MOTION TO
DISMISS CANCELLATION
PETITION**

I. Motion

Respondent Skydive Arizona, Inc. moves, pursuant to Rule 12(b)(6) and Rule 12(d) of the Federal Rules of Civil Procedure, to dismiss Cancellation No. 92/054,069 filed by Petitioner March Hogue (“Hogue”) for failure to state a claim upon which relief can be granted. In addition, Respondent moves to dismiss Cancellation No. 92/054,069 on grounds that it is barred by *res judicata*.

The Board should dismiss the Petition to Cancel filed in this case, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to plead sufficient facts to state a claim upon which relief can be granted. The Petition to Cancel filed in this case contains nothing more than labels and conclusions, and a formulaic recitation of the elements of a cause of action, which is insufficient. In addition, the Petition to Cancel filed in this case is barred by *res judicata*. The Board is requested to treat this motion to dismiss as a motion for summary judgment pursuant to Rule 12(d) of the Federal Rules of Civil Procedure. Consideration of this motion as a motion for summary is appropriate at this stage of the proceeding because this motion asserts claim and issue preclusion. *Zoba International Corp. v. DVD Format/LOGO Licensing Corp.*, 98 U.S.P.Q.2d 1106, 2011 TTAB LEXIS 69, at *4 n.4 (T.T.A.B. 2011) (“[O]ur consideration of the subject motion as one for summary judgment is appropriate at this stage of the proceedings because it asserts claim preclusion.”). Trademark Rule 2.127(e)(1) expressly allows a motion for summary judgment asserting claim or issue preclusion to be made prior to a party making its initial disclosures. 37 C.F.R. §2.127(e)(1).

II. Background

Respondent filed Application Serial No. 76/641,146 on June 17, 2005, which registered as Registration No. 3,099,847 on June 6, 2006. The ‘847 registration is for the mark SKYDIVE ARIZONA.

The SKYDIVE ARIZONA Registration matured from a use-based application filed under 15 U.S.C. § 1051(a), listing a first use date in commerce of 1986. Petitioner Hogue has not challenged Respondent’s priority.

The services listed in the SKYDIVE ARIZONA Registration are: “educational services, namely, providing instructions and training in parachuting and skydiving.” The application file is part of the record pursuant to Trademark Rule 2.122(b).

On September 28, 2001, Respondent filed a trademark infringement suit against Mike Mullins for infringement of Respondent's SKYDIVE ARIZONA mark. Exh. A, at 3; Exh. C, at 2 ("On September 28, 2001, Skydive Arizona initiated this lawsuit."). The trademark infringement suit was styled *Skydive Arizona, Inc. vs. Mike Mullins d/b/a Arizona Skydiving*, Civil Action No. CIV 01-1854 PHX SMM, in the United States District Court for the District of Arizona. Exh. D, at 1, ¶3.

Mike Mullins was operating a competing business under the mark "ARIZONA SKYDIVING. A final judgment was entered in favor of Respondent and against Defendant Mike Mullins in that trademark infringement suit. Exh. B. In May 2002, while that trademark infringement suit was pending, Petitioner Hogue purchased the business from Mike Mullins that was at issue in the trademark infringement suit. Exh. D, at 1, ¶2 ("Marc Hogue has entered into an agreement to purchase the business involving the skydiving operations previously conducted by Mike Mullins under the name of Arizona Skydiving... . Marc Hogue...has effectively taken over the skydiving operations of the business..."). Petitioner Hogue is the successor-in-interest to Defendant Mike Mullins in the prior trademark infringement suit, and is in privity with Defendant Mike Mullins.

The validity of the SKYDIVE ARIZONA mark was at issue in the trademark infringement suit. Defendant Mike Mullins asserted as defenses that the mark was invalid because it was allegedly descriptive of the services and allegedly geographically descriptive, the same issues that Petitioner Hogue attempts to raise again here in the Petition to Cancel filed in this proceeding. See Exh. A, at 18. In the trademark infringement suit, the federal court found that the SKYDIVE ARIZONA mark "describes the activity of skydiving in general, as well as the location of the service," but held that the mark was valid because it had acquired secondary meaning. Exh. A, at 18-19.

The federal court found that the SKYDIVE ARIZONA mark “has been continuously used for over 15 years” by Respondent. Exh. A, at 19. The court found that “Skydive Arizona is well known for instructional services and team training.” Exh. A, at 20. The court found that “Skydive Arizona is the largest dropzone in the world, and is well known worldwide.” Exh. A, at 21. Respondent “offered hundreds of pages of exhibits, dating pre-1998, to prove that [Respondent] advertised heavily both locally and worldwide. Exh. A, at 19. The court found that SKYDIVE ARIZONA hosted several national skydiving events. Exh. A, at 19. The court found that “Teams sponsored by Skydive Arizona have won approximately three quarters of all the gold metals awarded in freefall events in the United States National Championships and the World Championships since 1994.” Exh. A, at 20. The court found that “Skydive Arizona has annual non-competition events that attract many skydivers from around the country, and from other countries as well. ... These events draw hundreds of skydivers from around the world.” Exh. A, at 20. The court made findings concerning the extent that Respondent advertised using the SKYDIVE ARIZONA mark. Exh. A, at 20-21. In short, the court found that the evidence introduced by Respondent showed “a lengthy, continuous, frequent use of the mark, worldwide recognition, widespread advertising, [and] affiliation with worldwide events.” Exh. A, at 21.

Based upon the evidence introduced in the prior trademark infringement suit, the court found that “a finding of secondary meaning is appropriate as a matter of law.” Exh. A, at 21. This finding was necessary to support the court’s judgment. See Exhs. A, B & C.

While the trademark infringement suit was pending, Petitioner Marc Hogue entered into a Settlement Agreement with Respondent. Exh. D. In that Settlement Agreement, Petitioner agreed “to immediately change the name of his business to ‘Coolidge Skydiving,’ and will stop using the name ‘Arizona Skydiving’ ...”. Exh. D, at 1, ¶4. In return, Respondent agreed it would not sue Petitioner “for any claim of trademark infringement ... based upon the use of the ‘Arizona

Skydiving’ name in connection with the business purchased by Marc Hogue from Mike Mullins.” Exh. D, at 1-2, ¶5.

The Petition to Cancel filed in this case, in the first claim for relief, alleges as the basis for standing: “Petitioner is harmed by the registration of Respondent’s mark because Petitioner is unable to offer his goods and services, i.e., skydiving instruction in Arizona, without facing a challenge from Respondent for alleged infringement of Respondent’s mark.” The Petition fails to meet Hogue’s obligation to provide the grounds of his entitlement to relief. The Petition offers nothing more than labels and conclusions, and a formalistic recitation of the elements of a cause of action.

III. The Board Should Dismiss the Cancellation Petition Because Hogue’s Petition to Cancel Is Barred by *Res Judicata*

The doctrine of *res judicata* includes two concepts: (1) claim preclusion and (2) issue preclusion. *Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320 (Fed. Cir. 2008) (“[T]he doctrine of *res judicata* ... includes the two related concepts of claim preclusion and issue preclusion.”) (citation omitted). In this case, both doctrines apply. The Petition to Cancel should be dismissed because it is barred by claim preclusion. In addition, the Petition to Cancel should also be dismissed because it is barred by issue preclusion.

A. Hogue’s Petition to Cancel Is Barred by Claim Preclusion

Under the doctrine of claim preclusion, “a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action.” *Jet Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 55 U.S.P.Q.2d 1854 (Fed. Cir. 2000), *quoting Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979). Thus, claim preclusion will bar a party in a second suit if: (1) there is identity of parties (or their privies); (2) there has been an earlier final judgment on the merits of a claim; and (3) the second claim is based on the same set of transactional facts as the first. *Jet Inc. v. Sewage Aeration Systems*, 55 U.S.P.Q.2d at 1856; *see*

also *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955); *Flowers Industries, Inc. v. Interstate Brands Corp.*, 5 U.S.P.Q.2d 1580 (T.T.A.B. 1987).

Over the years, the doctrine has come to incorporate common law concepts of merger and bar, extending to those claims or defenses that could have been raised in the prior action. *Perma Ceram Enterprises Inc. v. Preco Industries Ltd.*, 23 U.S.P.Q.2d 1134, 1138 (T.T.A.B. 1992); see also *Jet Inc. v. Sewage Aeration Systems*, 55 U.S.P.Q.2d at 1856. (“Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.”).

Factor (1) is met in this case, because Petitioner Hogue is in privity with Mike Mullins, who was the defendant in a trademark infringement suit brought by Respondent. On September 28, 2001, Respondent filed a trademark infringement suit against Mike Mullins for infringement of Respondent’s SKYDIVE ARIZONA mark. Exh. A, at 3; Exh. C, at 2 (“On September 28, 2001, Skydive Arizona initiated this lawsuit.”). The validity of the SKYDIVE ARIZONA mark was at issue in the trademark infringement suit, and Defendant Mike Mullins asserted as defenses that the mark was invalid because it was allegedly descriptive of the services and allegedly geographically descriptive, the same issues that Petitioner Hogue attempts to raise again in the Petition to Cancel filed in this proceeding. In May 2002, while that trademark infringement suit was pending, Petitioner Hogue purchased the business from Mike Mullins that was the basis for the trademark infringement suit. Petitioner Hogue is the successor-in-interest to Defendant Mike Mullins, and purchased the business from Defendant Mullins with knowledge of the pending trademark infringement suit. Thus, factor (1) is met because there is an identity of parties or their privities. See *John W. Carson Foundation v. Toilets.com, Inc.*, 94 U.S.P.Q.2d 1942, 2010 TTAB LEXIS 226, at *17-19 (T.T.A.B. 2010).

Factor (2) is clearly met. In the prior trademark infringement action, the federal district

court entered a final judgment in favor of Respondent and against Defendant Mike Mullins on the defense of descriptiveness, and expressly found that the SKYDIVE ARIZONA mark had acquired secondary meaning. Exh. B; see also Exh. A.

Factor (3) is also met. Petitioner's claims in this case are based upon the same set of transactional facts as the prior trademark infringement suit. Petitioner's standing is based on the business that Petitioner purchased from Mike Mullins, the Defendant in the prior trademark infringement suit. The claims alleged in the Petition to Cancel are the same issues that were raised as defenses by Mike Mullins in the prior trademark infringement suit. Petitioner alleges that he provides skydiving educational services through business entities including Skydive Coolidge, Inc. See Petition to Cancel, ¶1. The same evidence would be introduced here by Petitioner to attempt to show that the SKYDIVE ARIZONA mark is descriptive, as the evidence that was used by Defendant Mike Mullins in the prior trademark infringement suit. The same evidence of secondary meaning introduced in the prior trademark infringement suit would be used here to once again show that the mark SKYDIVE ARIZOINE has acquired secondary meaning. This cancellation proceeding would merely be a re-litigation of exactly the same issues previously decided against Petitioner's predecessor in the prior trademark infringement suit.

“Under the doctrine of *res judicata*, the entry of a final judgment ‘on the merits’ of a claim in a proceeding serves to preclude the relitigation of the same claim, cause of action, or defense, in a subsequent proceeding that involves the same parties or their privities, even when the prior judgment resulted from the default, consent of the parties, or dismissal with prejudice.” *Zoba International Corp. v. DVD Format/LOGO Licensing Corp.*, 98 U.S.P.Q.2d 1106, 2011 TTAB LEXIS 69, at *7 (T.T.A.B. 2011). The Petition to Cancel in this case is an attempt to relitigate the defenses that Petitioner's predecessor-in-interest raised in the prior trademark infringement suit.

The Petition to Cancel should be dismissed, because (1) Petitioner Marc Hogue is in privity with Defendant Mike Mullins in the prior trademark infringement suit, (2) an earlier final judgment was entered on the merits of the claim; and (3) the claims asserted in the Petition to Cancel are the same as the descriptiveness defenses litigated in the prior suit, and are based on the same set of transactional facts as the prior lawsuit. The Petition to Cancel is essentially a collateral attack on the judgment entered in the prior trademark infringement suit, and an attempt to re-litigate the federal court's finding of secondary meaning.

B. Hogue's Petition to Cancel Is Barred by Issue Preclusion

Under the doctrine of issue preclusion, sometimes referred to as collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in a subsequent proceeding involving the same parties or their privities. *See Stephen Slesinger, Inc. v. Disney Enterprises, Inc.*, 2011 TTAB LEXIS 195, at *13 (T.T.A.B. June 8, 2011); *Int'l Order of Job's Daughters v. Lindeburg & Co.*, 727 F.2d 1087, 220 USPQ 1017, 1019 (Fed. Cir. 1984). The underlying rationale is that a party who has litigated an issue and lost should be bound by that decision and cannot demand that the issue be decided again. *Mother's Rest. Inc. v. Mama's Pizza, Inc.*, 723 F.2d 1566, 221 USPQ 394, 397 (Fed. Cir. 1983). That policy is implicated here where Petitioner is attempting to have this Board decide issues that Petitioner's predecessor already lost on. If this were permitted, a party losing a trademark infringement suit could merely transfer the business to someone else, and that new owner of the business could force the trademark owner to relitigate all of the issues that were already decided against the prior owner of the business.

In order for issue preclusion to apply, the following requirements must be met: (1) the issue to be determined must be identical to the issue involved in the prior litigation; (2) the issue must have been raised, litigated and actually adjudged in the prior action; (3) the determination

of the issue must have been necessary and essential to the resulting judgment; and (4) the party precluded must have been fully represented in the prior action. *See Mayer/Berkshire Corp. v. Berkshire Fashions Inc.*, 424 F.3d 1229, 76 USPQ2d 1310, 1312-13 (Fed. Cir. 2005); *Jet Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 55 USPQ2d 1854, 1858-59 (Fed. Cir. 2000); *Stephen Slesinger, Inc. v. Disney Enterprises, Inc.*, 2011 TTAB LEXIS 195, at *14 (T.T.A.B. June 8, 2011); *Larami Corp. v. Talk To Me Programs Inc.*, 36 USPQ2d 1840, 1843-44 (TTAB 1995).

In the prior trademark infringement action, the same issues of descriptiveness were decided. Respondent overcame the defense of descriptiveness by proving that the mark SKYDIVE ARIZONA had acquired secondary meaning. The federal court's decision submitted as Exhibit A shows that the issues are the same, and were actually raised, litigated, and actually adjudged in the prior trademark infringement suit.

The determination of the issue was necessary and essential to the resulting judgment. The rejection of the defenses of descriptiveness was necessary and essential to the court's judgment. Otherwise, the decision would have been in favor of Mullins.

The interests of Petitioner were fully represented by Hogue's predecessor-in-interest in the prior trademark infringement suit. The final requirement is also met if the parties are in privity, which is the case here.

III. The Board Should Dismiss the Cancellation Petition Because Hogue Has Not Stated a Claim Upon Which Relief Can Be Granted

Except as otherwise provided in the Trademark Rules, cancellation proceedings are governed by the Federal Rules of Civil Procedure. Trademark Rule 2.116(a); *Young v. AGB Corp.*, 152 F.3d 1377, 1378 n.3, 47 U.S.P.Q.2d 1752, 1754 n.3 (Fed. Cir. 1998). In a cancellation proceeding, a petition to cancel corresponds to the complaint in a court proceeding. Trademark Rule 2.116(c). Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be

granted.

Under Rule 8(a) of the Federal Rules of Civil Procedure, “a plaintiff must provide a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.” *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1354 (Fed. Cir. 2010) (internal quotations omitted), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

At the pleading stage, a cancellation petitioner must allege facts in support of a statutory ground for opposition. The problem with the Petition to Cancel filed in this case is that it merely alleges conclusions, and does not allege sufficient facts on which Petitioner Hogue would rely to prove the conclusions. “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (internal quotations omitted); *Totes-Isotoner*, 594 F.3d at 1354. “Mere parroting of the requisite elements without sufficient factual support therefor is insufficient to meet the requirements” for pleading a claim. *McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 48 (T.T.A.B. 1985) (Dismissing cancellation petition where “Petitioner has merely alleged the conclusion, not the facts on which it would rely to prove this conclusion.”).

The precedents of this Board require a petitioner in a cancellation petition to allege sufficient facts that, if proved, would provide a statutory ground for cancellation. *McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 47 (T.T.A.B. 1985) (“[B]ald allegations in the language of the statute neither give respondent fair notice of the basis for petitioner’s claim nor set forth **sufficient facts** to establish the elements necessary for recovery, if proven.”) (emphasis added). See also *Young v. AGB Corp.*, 152 F.3d 1377, 1380, 47 U.S.P.Q.2d 1752,

1755 (Fed. Cir. 1998) (“[W]e agree with the Board that Young failed to plead *any facts* relevant to a statutory ground negating AGB’s entitlement to registration.”) (emphasis added).

In summary, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. at 1949 (internal quotes and citation omitted). *See also Zoba International Corp. v. DVD Formay/Logo Licensing Corp.*, No. 92051821, 2011 TTAB LEXIS 69, at *1 (T.T.A.B. March 10, 2011).

The Supreme Court’s opinion in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), is instructive on the proper analysis that should be applied in determining whether sufficient facts are alleged to state a claim upon which relief can be granted. The Supreme Court further refined the analysis by explaining that a two step approach should be followed in deciding a Rule 12 motion to dismiss. First, the Board should identify allegations that “are no more than conclusions, [and] are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 129 S. Ct. at 1950. Second, the Board should consider the remaining factual allegations, if any, and “determine whether they plausibly give rise to an entitlement to relief.” *Id.*

Therefore, Respondent respectfully submits that the Board should first disregard the conclusions and labels in the Petition to Cancel, and then decide whether the remaining factual allegations, if any, are sufficient to establish a valid statutory ground for cancellation, (in the event that the factual allegations are proven to be true). *See Ashcroft v. Iqbal*, 129 S. Ct. at 1950. A cancellation petition should be dismissed where the “[p]etitioner has merely alleged the conclusion, not the facts on which it would rely to prove this conclusion.” *McDonnell Douglas Corp. v. National Data Corp.*, 228 U.S.P.Q. 45, 48 (T.T.A.B. 1985). In this case, the Petition to Cancel merely alleges conclusions, and does nothing more than parrot the elements of a descriptiveness claim.

V. Conclusion

In conclusion, Respondent Skydive Arizona, Inc. moves the Board to dismiss the Petition to Cancel in its entirety, because the Petition is barred by *res judicata* under the doctrine of claim preclusion and under the doctrine of issue preclusion, and because Petitioner Hogue has not plead facts sufficient to establish a claim upon which relief can be granted.

Respectfully submitted,

SNELL & WILMER L.L.P.

DATED: July 12, 2011

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Certificate of Transmission

I hereby certify that on this 12th day of July, 2011, I filed the foregoing SKYDIVE ARIZONA'S MOTION TO DISMISS CANCELLATION PETITION electronically through the Board's ESTTA system.

By: /David G. Barker/
David G. Barker

Certificate of Service

I hereby certify that on this 12th day of July, 2011, I caused a copy of the foregoing
SKYDIVE ARIZONA'S MOTION TO DISMISS CANCELLATION PETITION to be served
by United States Post Office, postage prepaid, in an envelope addressed to:

Jimmie Pursell
Jennings Strouss & Salmon PLC
One East Washington Street, Suite 1900
Phoenix, AZ 85004

By: /Sid Leach/
Sid Leach

Exhibit A

FILED	LODGED
RECEIVED	COPY
MAR 29 2004	
CLERK U S DISTRICT COURT DISTRICT OF ARIZONA	
BY	DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SKYDIVE ARIZONA LLC,

Plaintiff,

vs.

MIKE MULLINS,
d/b/a Arizona SKYDIVING,

Defendant.

No. CIV 01-01854-PHX-SMM

ORDER

Pending before the Court, *inter alia*, are Defendant's Motion for Summary Judgment on the Dilution claim [Doc. No. 51-1]; Defendant's Motion for Summary Adjudication that all forms of monetary award to the Plaintiff are barred [Doc. No. 54-1]; Defendant's Motion for Summary Adjudication on Claims Barred by Statute of Limitations [Doc. No. 55-1]; Plaintiff's Motion for Summary Judgment on Trademark Infringement Claim [Doc. No. 62-1]; Plaintiff's Motion in Limine to Exclude Evidence [Doc. No. 84-1]; Defendant's Motion to strike Declaration [75-1], Declaration [74-1], Declaration [73-1], Declaration [72-1], Declaration [71-1], Declaration [70-1], Declaration [69-1], Declaration [68-1], Declaration [67-1], and Declaration [66-1]; and Defendant's Motion to strike Exhibits [85-1] [Doc. No. 95-1]. After considering the arguments raised by the parties in their briefing and during oral argument, the Court now issues the following rulings.

SKY AZ031390

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1 **BACKGROUND**

2 SKYDIVE ARIZONA ("Plaintiff", "SKYDIVE Arizona") is limited liability corporation
3 established under the laws of Arizona whose principle place of business is in Arizona. Plaintiff
4 has been in business of providing skydiving services since 1986. Originally, SKYDIVE
5 ARIZONA was located at the Coolidge Airport in Coolidge, Arizona. Plaintiff has adopted the
6 mark, "SKYDIVE ARIZONA" in connection with its services and painted its aircraft with a its
7 name in a unique pattern and distinct colors. Furthermore, Plaintiff has advertised its services
8 in various media, including newspapers, magazines, telephone directories, and the Internet.
9 SKYDIVE ARIZONA offers instructional skydiving skills at all levels, serves as a training
10 facility for professional skydivers, and has hosted numerous national and world skydiving
11 competitions. In 1991, SKYDIVE ARIZONA relocated to Eloy, Arizona, a location
12 approximately 20 miles from the Coolidge airport. Since 1991, SKYDIVE ARIZONA has
13 hosted numerous skydiving competitions and has gained substantial fame in the niche market
14 of skydiving services. According to BOTH parties, SKYDIVE ARIZONA has developed a
15 reputation for providing high-quality skydiving services. (Defendant's Statement Of Facts)
16

17 Defendant Mike Mullins' ("Defendant", "Mullins") primary place of residence is
18 Germantown, Tennessee. Defendant has owned and operated a skydiving facility near
19 Memphis, Tennessee under the service mark "West Tennessee skydiving" since 1989. The
20 Defendant is an experienced pilot for Federal Express and operates a skydiving aircraft. The
21 Tennessee business provides instructional services and serves as a training facility for skydivers
22 throughout the United States and from many foreign countries. In December of 1998, Mullins
23 established a competing skydiving business located in Coolidge, Arizona, under the mark
24 "ARIZONA SKYDIVING COOLIDGE." Furthermore, Defendant registered the domain
25 name "www.arizonaskydiving.com" at that time.

26 Mullins operated the Arizona facility during the winter months (December through April)
27 from 1998 to 2002. In May 2002, Mullins sold his skydiving business to Mark Hogue who
28

1 changed the name of the business to "COOLIDGE SKYDIVING."

2 On September 28, 2001, SKYDIVE ARIZONA initiated this lawsuit, alleging
3 trade name infringement under the Lanham Act § 43(a), trade name dilution under the Lanham
4 Act § 43(c) and Arizona statute, and Arizona common law trade name infringement.

5 STANDARD OF REVIEW

6 A court must grant summary judgment if the pleadings and supporting documents,
7 viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue
8 as to any material fact and that the moving party is entitled to judgment as a matter of law."
9 Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Jesinger v.
10 Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines
11 which facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); see also
12 Jesinger, 24 F.3d at 1130. "Only disputes over facts that might affect the outcome of the suit
13 under the governing law will properly preclude the entry of summary judgment." Anderson,
14 477 U.S. at 248. The dispute must also be genuine, that is, the evidence must be "such that a
15 reasonable jury could return a verdict for the nonmoving party." Id.; see Jesinger, 24 F.3d at
16 1130.

17
18 A principal purpose of summary judgment is "to isolate and dispose of factually
19 unsupported claims." Celotex, 477 U.S. at 323-24. Summary judgment is appropriate against
20 a party who "fails to make a showing sufficient to establish the existence of an element essential
21 to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322;
22 see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party
23 need not disprove matters on which the opponent has the burden of proof at trial. See Celotex,
24 477 U.S. at 317. The party opposing summary judgment "may not rest upon the mere
25 allegations or denials of [the party's] pleadings, but . . . must set forth specific facts showing that
26 there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v.
27
28

1 Zenith Radio, 475 U.S. 574, 585-88 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044,
2 1049 (9th Cir. 1995).

3 DISCUSSION

4 As a preliminary matter, the Court notes the difficulty in working with the pleadings and
5 exhibits offered by both parties. In this Circuit, where the party's papers filed in support of and
6 opposing summary judgment are "extraordinarily difficult to use" due to their size and poor
7 citation, the court is not required to scour those papers in search of a genuine issue of triable
8 fact. Keenan v. Allan, 91 F.3d 1275, 1278-79 (9th Cir. 1996) (noting opposing papers, due to
9 size and poor citation, "obfuscates rather than promotes an understanding of the facts," and
10 declining to scour those papers or the rest of the record to determine if a genuine issue of triable
11 fact exists).

12 Furthermore, the Court's Rule 16 Order set forth clear instructions that the parties were
13 to contact the Court to schedule a hearing in the event of a discovery dispute. The Court held
14 two discovery dispute hearings in open court, however, neither party contacted the Court to
15 dispute the admissibility of evidence based on untimeliness and irrelevance at issue here.
16 Instead, the parties filed additional pleadings asking the Court to strike multiple exhibits.
17 Additionally, the Defendant made numerous objections to evidence without stating concisely
18 and clearly why the evidence was inadmissible. Pursuant to Rule 7 (b) (1) of the Federal
19 Rules of Civil Procedure, all motions filed with the Court shall "state with particularity the
20 grounds therefor, and shall set forth the relief or order sought." Fed. R. Civ. P. 7 (b) (1).
21 Lastly, the Defendant filed multiple Motions for Summary Judgment, some of which addressed
22 the same issues, without leave from the Court.

24 Nevertheless, despite the fact that the papers were difficult to use, the Court basis its
25 rulings on the record in its entirety. There are seven pending Motions in this case. First, the
26 Court will discuss the pending evidentiary objections. Next, the Court will consider the
27 Motions filed by the Defendant raising defenses that all claims are barred by the statute of
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1 limitations. Third, the Court will consider te Defendant's Motion for Summary Judgment on
2 the dilution claim. Fourth, the Court will consider Plaintiff's Motion for Summary Judgment
3 on the Trademark Infringement Claim. Lastly, the Court will consider the Defendant's Motion
4 for Summary Judgment that all claims for monetary relief are barred, and discuss any remaining
5 claims or prayers for relief, including the effect of Defendant's voluntary removal of its trade
6 name from the secondary register.

7 **Plaintiff's Motion in Limine to Exclude Evidence**

8 The Plaintiff filed a Motion in Limine to Exclude Evidence disclosed by the Defendant
9 after the discovery deadline. On February 3, 2003, and at Defendant's request, the Court granted
10 an extension to the discovery deadline. In that Order, the Court said "All factual discovery
11 must be completed by Friday April 4, 2003. No further extensions will be granted." The
12 Defendant has submitted evidence in support of its pleading that were not disclosed by the
13 deadline set by the Court.

14 In response to Plaintiff's Motion to exclude evidence, the Defendant offered several
15 questionable excuses for failure to timely disclose. By way of example, the Defendant asserts
16 that he "did not have time to prepare to be sued in this case." This case was filed on September
17 28, 2001. The ultimate discovery deadline was April 4, 2003, 554 days, or more than a year and
18 a half, later. Furthermore, the Court granted the Defendant an additional extension for the very
19 purpose of preparing disclosures. Thus, Defendants claims about not having time to prepare are
20 without merit.

21
22 Federal Rule of Civil Procedure 37 (c)(1) provides:

23 A party that without substantial justification fails to disclose information
24 required by rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be
25 permitted to use as evidence at trial at a hearing, or on a motion any witness
26 or information not so disclosed....

1 The Defendant has failed to show substantial justification for his failure to disclose
2 information. Furthermore, the failure is not harmless. Thus, the following pieces of evidence,
3 submitted by the Defendant after the discovery cut-off date, are excluded: DECLARATION OF
4 JARED DOUGLASS, DECLARATION OF MICHAEL LAWRENCE; DECLARATION OF
5 THOMAS L. O'BRIEN; TRADEMARK RESEARCH REPORT; EXHIBIT A TO THE
6 DECLARATION OF MIKE MULLINS; PAGE 2 OF EXHIBIT B TO DECLARATION OF
7 MIKE MULLINS; EXHIBIT C TO DECLARATION OF MIKE MULLINS liability waiver of
8 micheal lawrence, EXHIBIT D TO DECLARATION OF MIKE MULLINS liability waiver
9 vicki boldrini ; DECLARATION OF VICKY BOLDRINI; "90 PAGES OF EXHIBITS."

10 **Defendant's Motion to strike Declarations**

11 The Defendant has also filed Motions regarding the exclusion of evidence. Generally,
12 the Defendant seeks to exclude Twelve declarations, in whole or in part, and Thirty-seven
13 exhibits offered by the Plaintiff in support of their pleadings. The Court will resolve each
14 objection, in turn.

15 As a preliminary matter, the Court notes the many objections based on irrelevance
16 because of timing. In general, statements regarding post 1998 information *in effort to establish*
17 *fame* are irrelevant and inadmissible. However, the statements that go to *confusion*, even those
18 dating post 1998, are admissible (absent some other valid objection). Furthermore, the
19 Defendant argues that many of the affidavits are inadmissible because they are not based on
20 personal knowledge. Every affidavit offered by the Plaintiff includes the sentence "I make this
21 statement based on my own personal knowledge." Personal knowledge is inferred from that
22 statement *and from* the fact that the speakers held positions as employees at SKYDIVING
23 ARIZONA. Thus, after considering each statement and whether it is based on personal
24 knowledge, the Court finds that each affidavit, except the affidavit of Ben Cruz, is based on
25 personal knowledge and all remaining objections under this basis are overruled. Lastly, the
26 Court notes that many of the exhibits and declarations that are objected to are supported by other
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1 admissible evidence. Thus, the Plaintiff is still able to support his Motion for Summary
2 Judgment in its entirety regardless of the following evidentiary rulings.

3 The Defendant claims the DECLARATION OF BRYAN BURKE should be excluded
4 because it is irrelevant and inadmissible. Furthermore, the Defendant claims there is a lack of
5 foundation. Additionally, the Defendant claims the declaration contains inadmissible hearsay.
6 The court finds that the affidavit is admissible to show actual confusion, and that it is properly
7 based on personal knowledge. The declaration is admissible.

8 The Defendant argues that the DECLARATION OF GARY V. BORN or portions thereof,
9 is inadmissible. Mr. Born's affidavit includes testimony about an alleged conversation with
10 Mike Mullins (the Defendant). Supposedly, regarding the opening of the ARIZONA
11 SKYDIVING COOLIDGE facility, Mr. Mullins said "this will bite Larry in the Ass." The
12 alleged comment goes to motivation to open the business or to intent, but is not offered for its
13 truth. The affidavit also includes testimony that other people referred to Defendants business
14 as just "Arizona Skydiving." The court finds that the declaration is admissible.

15 The Defendant argues that the DECLARATION OF JOY TAYLOR, or portions thereof,
16 is inadmissible. Ms. Taylor's affidavit is based on personal knowledge gained from her position
17 at the Eloy Chamber of Commerce. Ms. Taylor has personal knowledge that suggests confusion
18 existed between the Plaintiff's business and Defendant's business. Ms. Taylor's affidavit is
19 admissible to show actual confusion.

20 The Defendant argues that the DECLARATION OF RICHARD NORTON, or portions
21 thereof, is inadmissible. Additionally, the Defendant argues that the DECLARATION OF
22 DENNIS DECKER, or portions thereof, is inadmissible. Both of these declarations contain
23 statements as to what others in the community think. Therefore, to some extent, they are
24 improper layperson opinion. However, the statements regarding confusion are potentially based
25 on personal knowledge. Regardless, the admissibility of the statements are of no consequence
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1 here as each fact they go to support are supported by other admissible evidence. Thus, the Court
2 can issue its ruling on the Motions absent a ruling on the admissibility of the declarations.

3 The Defendant argues that the DECLARATION OF BEN CRUZ, or portions thereof,
4 is inadmissible. As to this declaration, the Defendant's objection based on improper lay person
5 opinion not supported by a proper foundation has merit, and the declaration is inadmissible.

6 The Defendant argues that the DECLARATION OF LEILA KATHLEEN MOFFITT, or
7 portions thereof, is inadmissible. The statement is based on Personal Knowledge, apparent
8 through her statement that it is, and inferred from her position. The declarant also says she was
9 "personally confused," that she is familiar with the community, and that members of the public
10 were confused. Specifically, Ms. Moffitt, thought Plaintiff's business was called ARIZONA
11 SKYDIVING and states, based on personal knowledge, that she knows that members of public
12 were confused. The Declaration is admissible.

13 The Defendant argues that the DECLARATION OF LARRY HILL, or portions thereof,
14 is inadmissible. The Defendant makes numerous objections to the statement under FRE 701,
15 602, 901, 902, and 402. Most notably, the Defendant argues that the statement includes
16 information that a lay person is not qualified to give such as the statement "Both Arizona
17 Skydiving and Skydive Arizona acquired secondary meaning before 1998 and were associated
18 with Plaintiff." To the extent that the Plaintiff uses Mr. Hill's statement as its only evidence in
19 support of the arguments in its Motion, the Court notes that the statement is not alone proof of,
20 for example, acquiring secondary meaning. However, Mr. Hill, as owner of Skydive Arizona,
21 is entitled to testify that based on his experience as an owner, it is his belief that the name of both
22 businesses acquired secondary meaning, *i.e.*, were associated with him and his business. The
23 objections go to the weight his testimony should be given, not its admissibility.

24 The Defendant argues that the DECLARATION OF AL GRAMANDO, or portions
25 thereof, is inadmissible. Specifically, the Defendant objects to comments about Student call
26 under the hearsay exception. The statement is being offered to prove confusion, not the fact that
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1 they were "almost at the SKYDIVE ARIZONA facility." Furthermore, the Defendant objects
2 to the Television Crew who came to SKYDIVE ARIZONA not being offered to prove that they
3 came to the facility, but rather, to prove confusion between the two businesses. While the Court
4 might deem the evidence inadmissible under a FRE 403 the theory that it is highly prejudicial
5 (fatality at the ARIZONA SKYDIVING COOLIDGE facility), this case to be tried by a judge.
6 When the Judge, rather than jury, is trier of fact, the threat that the trier of fact will improperly
7 base liability on an accident at the Defendant's facility rather than on proper evidence disappears.
8 Therefore, the Court finds that the statement is admissible and will give the evidence due weight.

9 The Defendant argues that the DECLARATION OF PAT PATTON, or portions thereof,
10 is inadmissible. While Mr. Patton does make several comments about incidents of confusion
11 existing after the relevant time period, facts going to confusion need not pre-date 1998, as
12 discussed above. To the extent it goes to confusion existing, Mr. Patton's declaration is
13 admissible.

14 The Defendant argues that the DECLARATION OF KRISTIN GRAMANDO, or portions
15 thereof, is inadmissible. The Defendant also argues that the SUPPLEMENTAL
16 DECLARATION OF KRISTIN GRAMANDO, or portions thereof, is inadmissible. For the
17 same reasons stated above, Ms. Gramando's statements are based on personal knowledge
18 inferred from her statement providing such and from her position as an employee at
19 SKYDIVING ARIZONA. To the extent that her comments concern confusion, they are
20 admissible as evidence.

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22 **Defendant's Motion to Strike Exhibits**

23 Defendants Motion to Strike EXHIBIT 1, a Discovery Channel Videotape, 200 World
24 Cup at SKYDIVE ARIZONA is granted. Defendant argues the tape is irrelevant, lacks
25 foundation within relevant time period, FRE 402. The Court finds that the videotape was
26 submitted to show fame and its timing makes it irrelevant. For the same reasons stated above,
27 EXHIBIT 2 Videotape, Channel 12 News, "Cruzing Arizona" is stricken from the record.

1 The Defendant argues that Plaintiff's EXHIBIT 3, an Email from Gary & Shannon Popell
2 dated Nov. 9, 2001 is Inadmissible Hearsay under FRE 802, lacks Authentication under FRE
3 901/902 and is not based on personal knowledge of the declarant so therefore inadmissible under
4 FRE 602.

5 The Defendant argues that Plaintiff's EXHIBIT 7, ARIZONA SKYDIVING COOLIDGE
6 Website, is inadmissible hearsay under FRE 802 and Lacks authentication under FRE 901/902.
7 The Court finds that the evidence is admissible under the Statement by a Party Opponent
8 exception to the Hearsay Rule and has been properly authenticated by the Declaration of Sid
9 Leach. For the same reasons, Defendant's Motion to strike EXHIBIT 8 AZ SKYDIVING
10 COOLIDGE Website, EXHIBIT 9, EXHIBIT 10 and EXHIBIT 11 is denied. Each of these is
11 admissible under the Statement by a Party Opponent exception to the Hearsay Rule 801(d)(2)
12 and has been properly authenticated by the Declaration of Sid Leach.

13 The Defendant argues that Plaintiff's EXHIBIT 9 and EXHIBIT 10 are inadmissible.
14 These exhibits are offered to prove that at times the Defendant did not use "Coolidge" when
15 advertising and describing his business. The Defendant argues that the evidence is inadmissible
16 as .

17 The Defendant argues that Plaintiff's EXHIBIT 14 and EXHIBIT 15 are offered to show
18 web sites confusedly associate the Plaintiff's business with ARIZONA SKYDIVING.

19 The Defendant argues that EXHIBIT 16, a Copy of the settlement agreement between the
20 Plaintiff and Mark Hogue is admissible. Offered to show actual confusion. Normally, under the
21 rules of evidence, a settlement agreement is inadmissible. However, here, the agreement is
22 admissible under FRE 408 because it is offered for a different purpose than proving liability of
23 a party to a settlement. Allowing admission of the settlement agreement here would not
24 discourage settlement negotiations, the purpose of the rule) as the parties to the settlement are
25 not the same parties to the action. Under 408, the settlement agreement is admissible.
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1 The Defendant argues that Plaintiff's EXHIBIT 18 is inadmissible. However, this exhibit
2 is offered only to show that the Plaintiff has a website. That fact is undisputed. Thus, the
3 Motion to Strike this exhibit in particular is denied.

4 The Defendant argues that EXHIBIT 20, Sky Dive Arizona 1998-1999 Info Magazine
5 is inadmissible because it lacks authentication under FRE 901/902 and is irrelevant, no
6 foundation within relevant time period FRE 402. The Court finds that the exhibit is self-
7 Authenticating under FRE 902(6) and is admissible as it concerns the relevant time period,
8 1998-1999.

9 The Defendant argues EXHIBIT 48 Pages from *Parachutist* Magazine 1999, and
10 EXHIBIT 49 Pages from *Parachutist* Magazine 2000 are irrelevant FRE 402. The Court finds
11 that the evidence is inadmissible to the extent it is offered to show secondary meaning or
12 establish service mark as the publication dates make it irrelevant.

13 Additionally, EXHIBIT 50 Pages from 2001 issues of *Parachutist*, *Skydiving*, *Scottsdale*
14 *Aviation & Business Journal* Magazine are inadmissible to show secondary meaning or to
15 establish service mark as their timing makes them irrelevant under FRE 402.

16 Additionally, EXHIBIT 52 Pages from *Parachutist* Magazine 2003 are inadmissible to
17 show secondary meaning or establish service mark as their timing makes them irrelevant under
18 FRE 402.

19 The Defendant argues EXHIBIT 53 and EXHIBIT 54 copies of Defendant's Website
20 Lack Foundation under FRE 901/902. The Court finds that the evidence is admissible under the
21 Statement by a Party Opponent exception to the Hearsay Rule and has been properly
22 authenticated by the Declaration of Sid Leach.

23 The Defendant argues that EXHIBIT 56, Pages from various Newspapers, are
24 inadmissible because they lack foundation. The Court finds that the Exhibit is admissible as the
25 newspaper pages are Self-Authenticating under FRE 902(6). For the same reasons, EXHIBIT
26 57, an Article Published in Swedish Skydiving Magazine is admissible.
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1 The following exhibits are not relied upon by the Plaintiff in support of its Motion for
2 Summary Judgment. Thus, the Motion to Strike them is not necessary nor appropriate and the
3 Motion as to Exhibits 12, 13, 19, 43, 44, 46, 51, 58, 59, 60, 61, 62 in particular will be denied.

4 **Defendant's Motion for Summary Adjudication: Claims Barred by Statute of Limitations**

5 In determining whether the statute of limitations bars suit, the Court will conduct a two
6 part analysis for each claim. First, the Court will determine the applicable statute of limitation
7 period for each claim. Second, the Court will determine when the statute of limitations began
8 to toll. Here, the applicable statute of limitations period as well as when the statute of limitations
9 began to toll for each claim is in dispute. The Defendant argues that each of the claims, the
10 trademark infringement claim, the dilution claim and the state law claim are all barred by the
11 statute of limitations. The Court will consider each argument in turn.

12 **a. The Trademark Infringement Claim**

13 The Lanham Act does not provide an applicable statute of limitations. When a federal
14 law such as the Lanham Act is silent in regards to a statute of limitation, courts are permitted to
15 "borrow" a limitations period from an analogous state law. See Reed v. United Transp. Union,
16 488 U.S. 319, 323-24 (1989); Wilson v. Garcia, 471 U.S. 261, 266-67 (1989); Tyler v. Reynolds
17 Metal Co., 600 F.2d 232, 234 (9th Cir. 1979).

18 The Defendant argues that Plaintiff's § 43(a) claim is most analogous to Arizona's service
19 mark infringement statute, A.R.S. § 44-1451. The Arizona trade name infringement statute has
20 a statute of limitation of one year, as governed by A.R.S. § 12-541.

21 Although Plaintiff supports the Defendant's proposition that Arizona's statute of limitation
22 should apply, Plaintiff argues that a § 43(a) violation is more analogous to fraud. Under Arizona
23 law, the period of limitations for fraud is three years. A.R.S. § 12-550. Plaintiff also argues that
24 the tort of trade name infringement is an ongoing one because the Defendant was continuously using
25 a similar mark. Thus the time frame in which the statute of limitations begins to run extends
26 beyond November 1998.
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1 Because the Lanham Act contains no statute of limitations, courts have often looked to
2 analogous limitations periods in state laws. See Reed, 488 U.S. at 323-24; Wilson, 471 U.S. at
3 266-67; Tyler, 600 F.2d at 234. A survey of cases from other districts have held that a violation
4 of Lanham Act § 43(a) is most analogous to fraud. Johannsen v. Brown, 797 F. Supp. 835, 839-
5 40 (D. Ore. 1992); Unlimited Screw Prods., Inc. v. Malm, 781 F. Supp. 1121, 1125 (E.D. Va.
6 1991); Monkelis v. Scientific Sys. Servs., 653 F. Supp. 680, 684 (W.D. Pa. 1987); PepsiCo, Inc.
7 v. Dunlop Tire & Rubber Corp., 578 F. Supp. 196, 199 (S.D.N.Y. 1984); Fox Chem. Co. v.
8 Amsoil, Inc. 445 F. Supp. 1355, 1359 (D. Minn. 1978). Under Arizona law, a three year period
9 of limitation applies for fraud. A.R.S. § 12-543. Therefore, this Court will apply a three-year
10 period of limitations for the Plaintiff's service mark infringement claim under the Lanham Act.

11 The parties also dispute when the statute of limitations began to toll. While the Ninth
12 Circuit has not ruled on this precise issue, other circuits have found that "[t]rademark
13 infringement is a continuous wrong and, as such, gives rise to a claim for relief so long as the
14 infringement persists." James Burrough, Ltd. v. Sign of the Beefeater, Inc., 572 F.2d 574, 578
15 (7th Cir. 1978). See also, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31:33
16 (4th ed.). Similarly, the Fourth Circuit has held that in terms of copyright and trademark
17 infringement, each separate sale is an act of infringement. Lyons Partnership v. Morris
18 Costumes, Inc. 243 F.3d 789, 797 (4th Cir. 1997). Furthermore, "the statute of limitations does
19 not shield the defendant from liability for wrongful acts actually committed during the
20 limitations period...." Id. However, the plaintiff is unable to "recover for claims that accrued
21 outside the limitations period[s]." Id. (quoting Hotaling v. Church of Jesus Christ of Latter-Day
22 Saints, 118 F.3d 199 (4th Cir. 1997)).

23 Defendant argues that SKYDIVE ARIZONA was on actual notice of Mullins' service
24 mark in late 1998 when Defendant began advertising their skydiving services in magazines,
25 targeting mailings to members of the skydiving community, and hosting an Internet site.
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1 Furthermore, the Defendant contends that the statute of limitations began running in December
2 1998 when the Defendant actually started operating ARIZONA SKYDIVING COOLIDGE.

3 Defendant Mullins operated ARIZONA SKYDIVING COOLIDGE during the winter
4 months from 1998 to 2002. Because trademark infringement has been categorized as a
5 continuous tort, defendant's last alleged act of infringement would have occurred in early 2002.
6 Plaintiff filed this suit on September 28, 2001, well before the last infringing act occurred in
7 2002. Therefore, Plaintiff's Lanham Act claims under § 43(a) are not time barred. Furthermore,
8 in applying Arizona's three year statute of limitation, Plaintiff may recover damages which may
9 have accrued three years prior to filing suit.

10 **b. The State Law Claim**

11 For the same reasons stated above, the trademark infringement claim based on state law
12 is not barred by the statute of limitations.

13 **c. The Dilution Claim**

14 The Plaintiff has also brought claims against Defendant under the Federal Trademark
15 Dilution Act, 15 U.S.C. § 1125(c).

16 The Defendant argues any dilution claims brought by the Plaintiff are barred by the statute
17 of limitations. Claims brought under the Lanham Act § 43(c) are most analogous to A.R.S. §
18 44-1448.01, Arizona's dilution statute. The applicable statute of limitation in Arizona for both
19 trade name infringement and dilution is one year. A.R.S. § 12-541. Therefore, Defendant
20 argues that Plaintiff's claims are barred because they filed thirty-four months after December
21 1998.

22 For purposes of Trademarks, Dilution is the "impairment of a Trademark's strength or
23 effectiveness caused by the use of the mark on an unrelated product, [usually] blurring the
24 Trademark's distinctive character or tarnishing it with an unsavory association. Trademark
25 Dilution may occur even when the use is not competitive and when it creates no likelihood of
26 confusion." Blacks Law Dictionary 1145 (7th ed. 1999).

1 As with the Trademark infringement claim, the dilution claim is based on ongoing acts by
2 the Defendant, ultimately leading to the weakening of the mark. The applicable statute of
3 limitations period is one year, yet the Plaintiff filed suit before the period began to toll. Thus, the
4 dilution claims are not barred by the statute of limitations.

5 **Defendant's Motion for Summary Judgment on the Dilution claim.**

6 Counts II and IV of Plaintiff's Amended Complaint allege that Defendant's use of the
7 service mark "Skydiving Arizona" has diluted the strength of Plaintiff's mark, under the Lanham
8 Act § 43(c) and Arizona statute, respectively. On May 30, 2003 Defendant Mullins filed a
9 Motion for Summary Judgment on the State and Federal dilution claims. The Defendant contends
10 that the Plaintiff cannot establish a valid claim for dilution under the Federal or State statute
11 because 1) the mark is not famous, 2) the mark is weak and 3) the Defendant's mark is not
12 identical or substantially similar. In opposing Defendant's motion, Plaintiff argues that the
13 "SKYDIVE ARIZONA" mark is considered famous in a niche market. Furthermore, Plaintiff
14 argues SKYDIVE ARIZONA has invest over a million dollars in advertising and promoting his
15 mark.
16

17 As noted above, for purposes of Trademarks, Dilution is the "impairment of a Trademark's
18 strength or effectiveness caused by the use of the mark on an unrelated product, [usually] blurring
19 the Trademark's distinctive character or tarnishing it with an unsavory association. Trademark
20 Dilution may occur even when the use is not competitive and when it creates no likelihood of
21 confusion." Blacks Law Dictionary 1145 (7th ed. 1999).

22 "Dilution is a cause of action invented and *reserved for a select class of marks* – those
23 marks with such powerful consumer associations that even non-competing uses can impinge on
24 their values." Avery Dennison Corp., 189 F.3d at 875 (emphasis added). Factors a court may
25 consider in determining whether a mark is "distinctive and famous" are enumerated in the
26 Lanham Act. They are:

27 (A) the degree of inherent or acquired distinctiveness of the mark;
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1 (B) the duration and extent of use of the mark in connection with the goods or services
2 with which the mark is used;
3 (D) the duration and extent of trading area in which the mark is used;
4 (E) the geographical extent of the trading area in which the mark is used;
5 (F) the degree of recognition of the mark in the trading areas and channels of trade used
6 by the marks' owner and the person against whom the injunction is sought;
7 (G) whether the mark was registered [with the U.S. Patent and Trademark Office]...

8 15 U.S.C. § 1125 (c)(1); Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1324 (9th Cir. 1998)
9 (interpreting 15 U.S.C. § 1125(c)(1)). Registration of the mark on the Principle Register with the
10 U.S. Patent and Trademark Office creates a presumption of distinctiveness. 15 U.S.C. § 1057(b);
11 American Trading, Inc. v. Russ Berrie & Co., 966 F.2d 1284, 1287 (9th Cir. 1992).

12 Here, it is undisputed that the mark was not registered and that it has been in use since
13 1986. The Plaintiff has also come forward with evidence to establish that it has achieved fame
14 in the niche market of skydiving. First, the Plaintiff has provided proof of advertising. Next, the
15 Plaintiff purports to offer, through layperson opinion testimony, that Skydive Arizona is famous.
16 Additionally, the Plaintiff offers deposition testimony of Mark Hogue, the current owner of what
17 used to be Defendant's skydiving facility. Lastly, the Plaintiff attempts to utilize a statement by
18 the Mayor Ben Cruz to establish fame.
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20 In short, the Plaintiff has failed to come forward with enough admissible evidence to
21 withstand Summary Judgment on the dilution claim. First, the Mayor's testimony is irrelevant to
22 establish fame because it concerns a time later than 1998. Second, the Ninth Circuit has held
23 that advertising, alone, is not enough to survive Summary Judgment on a Dilution claim. Avery
24 Dennison Corp., 189 F.3d at 875.

25 As a whole, the Plaintiff has failed to present a genuine issue of triable fact on the issue
26 of whether it has "such powerful consumer associations" necessary to prevail on a dilution claim.
27 "Where the record taken as a whole could not lead a rational trier of fact to find for the non-
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1 moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587 (citation omitted).
2 Viewing the entire record in the light most favorable to Plaintiff, the Court finds that no
3 reasonable jury could return a verdict in favor of Plaintiff on the dilution claim. Thus, the
4 Defendant's Motion for Summary Judgment on the Dilution Claim is granted.

5 **Plaintiff's Motion for Summary Judgment on Trademark Infringement Claim**

6 Under the Lanham Act, a person who commercially uses "any reproduction, counterfeit,
7 copy or colorable imitation of a registered mark" to advertise "any goods or services" that is likely
8 to cause confusion to the public is liable in a civil action to the registrant of the mark. 15 U.S.C.
9 § 1114(1)(a) (1990).

10 Additionally,

11 [a]ny person who, on or in connection with any goods or services, or any container for
12 goods, uses in commerce, any word, term, name, symbol, or device, or any combination
13 thereof, or any false designation of origin . . . which is likely to cause confusion, or to
14 cause mistake, or to deceive as to the affiliation, connection, or association of such person
15 with another person, or as to the origin, sponsorship, or approval of his or her goods,
16 services, or commercial activities by another person . . . shall be liable in a civil action by
17 any person who believes that he or she is likely to be damaged by such act."

18 *Id.* § 1125(a)(1)(A). Thus, the first entity to use a particular name or mark owns the name or
19 mark to preclude others from use if a likelihood of confusion or deception exists as to the origin
20 of the goods offered. Academy of Motion Picture, Arts & Sciences v. Creative House
21 Promotions, Inc., 944 F.2d 1446, 1454 (9th Cir. 1991).

22 Trademark law is primarily concerned with identification of the maker of a product so as
23 to avoid confusing the consumers. International Order of Job's Daughters v. Lindeburg & Co.,
24 633 F.2d 912, 915 (9th Cir. 1980), cert. denied, 452 U.S. 941 (1981). Although the issue of
25 likelihood of confusion is a mixed question of law and fact, the Ninth Circuit has treated it as
26 predominantly factual in nature. See Levi Strauss & Co. v. Blue Bell Inc., 778 F.2d 1352, 1355
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1 (9th Cir. 1985). Thus, the determination of admissibility of evidence, above, was crucial to this
2 ruling.

3 To establish likelihood of success on the merits, Plaintiff must show that Defendant's mark
4 is confusingly similar to its own valid, protectable mark. Federal registration is prima facie
5 evidence of ownership and validity of a trademark. See 15 U.S.C. 1057(b); 15 U.S.C. 1115(a);
6 Brookfield, 174 F.3d at 1047. However, a lack of registration does not prevent protection under
7 the Act. See Metro Publishing Limited vs. San Jose Mercury News, 987 F.2d 637, 640 (9th Cir.
8 1993) (holding that "it is not necessary that a trademark be registered in order for it to qualify for
9 protection under the Lanham Act") (reversed and remanded on other grounds).

10 Trademark Law groups terms into four categories: "(1) generic, (2) descriptive, (3)
11 suggestive and (4) arbitrary or fanciful. Generic terms do not relate exclusively to the trademark
12 owner's product because they are common words or phrases that describe a class of goods rather
13 than an individual product. New Kids On the Block v. New Am. Publ'g, Inc., 971 F.2d 302, 306
14 (9th Cir. 1992). Descriptive terms, however, describe a person, a place or an attribute of a
15 product." Id. They suffer from the same problem as generic terms, because they tend to consist
16 of common words that might be the only way to describe a category of goods, we do not grant
17 exclusive property rights in them. Id.

18
19 SKYDIVE ARIZONA is both generic and descriptive. It describes the activity of
20 skydiving in general, as well as the location of the service. SKYDIVE ARIZONA does not
21 necessarily dispute that its name is generic and /or descriptive, but rather, asserts that its name
22 has acquired secondary meaning. "[A] descriptive term can become protectable provided that
23 it has acquired "secondary meaning" in the minds of consumers, *i.e.*, it has become distinctive
24 of the trademark applicant's goods in commerce." Filipino Yellow Pages v. Asian Journal
25 Publications, Inc., 198 F.3d 1143, 1147 (9th Cir. 1999).

26
27 In general, establishing "secondary meaning" requires a showing of "a mental
28 recognition in buyers' and potential buyers' minds that products connected with the

1 [mark]...emanate from or are associated with the same source." Levi Strauss & Co. v. Blue
2 Bell, Inc., 632 F.2d 817, 820 (9th Cir. 1980). In evaluating the sufficiency of evidence of
3 secondary meaning, courts look to a number of factors, including "(1) whether actual
4 purchasers of the product bearing the claimed trademark associate the trademark with the
5 producer, (2) the degree and manner of advertising under the claimed trademark, (3) the
6 length and manner of use of the claimed trademark, and (4) whether use of the claimed
7 trademark has been exclusive." Community for Idaho's High Desert, Inc. v. Yost, 92 F.3d
8 814, 822 (9th Cir. 1996). When descriptive marks are especially "weak," we require a "strong
9 showing of strong secondary meaning." Filipino Yellow Pages, 198 F.3d at 1151.

11 The Plaintiff can establish secondary meaning in many ways, including (but not limited
12 to) direct consumer testimony; survey evidence; exclusivity, manner, and length of use of
13 mark; amount and manner of advertising; amount of sales and number of customers;
14 established place in the market; and proof of intentional copying by the defendant. Filipino
15 Yellow Pages, 198 F.3d at 1151 citing 2 J. Thomas McCarthy, Trademarks and Unfair
16 Competition §15:30 (4th ed.1997).

17 The Plaintiff has set forth facts that suggest that "Skydiving Arizona" has acquired
18 secondary meaning within the market of skydiving. The plaintiff has offered hundreds of
19 pages of exhibits, dating pre-1998, to prove that Skydiving Arizona advertised heavily both
20 locally and worldwide. The Plaintiff has offered proof of several national skydiving events
21 have been held at his location, and has submitted testimony from friends and co-workers
22 regarding how well known skydiving is throughout the world, and has shown that his mark
23 has been continuously used for over 15 years.

25 To preclude Summary Judgment, the Defendant argues that whether a mark has
26 acquired secondary meaning is a question of fact. The Defendant is correct to the extent that a
27 genuine issue of material fact on whether secondary meaning exists *can* be a question for the
28

1 trier of fact. See Clicks Billards 251 F.3d at 1262. However, it then follows that to survive
2 summary judgment, the [Defendant] is required to come forward with enough evidence to
3 establish a genuine issue of fact. See Fed.R.Civ.P. 56(e). Here, the Plaintiff has submitted
4 evidence to support a finding that secondary meaning was acquired, and the Defendant has not
5 put those facts in dispute. Rather, the Defendant has relied on evidentiary objections and
6 vague notions that Plaintiff's evidence is not enough. See Defendant's Opposition to
7 Plaintiff's Motion for Summary Judgment.

9 Furthermore, the Defendant admitted the following in his "Separate Statement of
10 Undisputed Material Facts in Support of Motion for Summary Judgement on the Dilution
11 Claim":

12 "Skydive Arizona is know as the largest dropzone in the world."

13 "Many sponsored team members who are world champions in
14 skydiving travel to other drop zones to coach teams, thereby spreading the
15 fame of Skydive Arizona in this niche market."

16 "Skydive Arizona is well know for instructional services and team
17 training, and the national skydiving teams representing the countries of
18 Japan, France, Italy, Austria, Denmark, Finland, Great Britain, Germany,
19 Brazil, Argentina, Australia, New Zealand and Israel."

20 "Teams sponsored by Skydive Arizona have won approximately three
21 quarters of all the gold metals awarded in freefall events in the United States
22 National Championships and the World Championships since 1994."

23 "Skydive Arizona has annual non-competition events that attract
24 many skydivers from around the country, and from other countries as well. ...
25 These events draw hundreds of skydivers from around the world."

26 "Skydive Arizona advertises monthly in Parachutist Magazine 9the
27 official publication of the United Tsates Parachute Association), Skydiving
28 magazine (United States), Air Press (Brazil), Para Mag (France), Frittfall
Magazine (Norway), Skydive the Mag (the British Parachute Association

1 magazine), and Thunderbolt (Luke Air Force Base). Skydive Arizona pays a
2 monthly fee for advertising in the yellow pages in phoenix, the Yellow Pages
3 in Tucson, The Arizona State web site, and the University of Arizona web
4 site. Skydive Arizona also regularly advertises [in] the College
5 Times(reaches over 170,000 students at more than 20 colleges throught the
6 Valley, including Arizona State University, the New Times, the State Press
7 (a Daily Newspaper at Arizona State University), and the Arizona Daily
8 Wildcat..."

9 "Plaintiff spends approximately \$13, 882 per month for advertising,
10 and the Plaintiff has invested a total of \$471,988 for advertising over the last
11 34 months."

12 "Skydive Arizona maintains a website on the Internet that displays the
13 Skydive Arizona mark in connection with advertisements..."

14 "The Skydive Arizona mark is visible on the aircraft when skydivers
15 board the aircraft."

16 Essentially, the Defendant has set forth all of the facts alleged by Plaintiff is its own
17 statements of facts, and labeled them undisputed. The Defendant confirms facts that were set
18 forth by the Plaintiff showing a lengthy, continuous, frequent use of the mark, worldwide
19 recognition, widespread advertising, affiliation with worldwide events. Most notably,
20 however, the Defendant confirms in its filing to the Court that Skydive Arizona is the largest
21 dropzone in the world, and is well know worldwide.

22 In this unique situation where the Defendant does not dispute any of the facts set forth
23 by the Plaintiff to establish secondary meaning, and where the Defendant is not able to
24 establish any genuine issue of material fact on the matter, a finding of secondary meaning is
25 appropriate as a matter of law.

26 In order to establish trademark infringement, a plaintiff must prove that a defendant is
27 using a mark confusingly similar to a valid, protectable trademark owned by the plaintiff. See
28 Brookfield Communications v. West Coast, 174 F.3d 1036, 1046 (9th Cir. 1999). "A

1 likelihood of confusion exists when consumers 'are likely to assume that a product or service
2 is associated with a source other than its actual source because of similarities between the two
3 sources' marks or marketing techniques." International Jensen v. Metrosound U.S.A., 4 F.3d
4 819, 825 (9th Cir. 1993). The Ninth Circuit generally considers eight factors in determining
5 whether a likelihood of confusion exists: (1) the similarity of the marks; (2) the relatedness of
6 the companies' services; (3) the marketing channels used; (4) the strength of the plaintiff's
7 mark; (5) the defendant's intent in selecting its mark; (6) evidence of actual confusion; (7) the
8 likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by
9 purchasers. See GoTo.com, 202 F.3d 1199, 1200 (9th Cir. 2000), citing AMF, Inc. v.
10 Sleekcraft Boats, 599 F.2d 341, 348-349 (9th Cir. 1979).

12 A finding of likelihood of confusion does not require a showing of actual confusion or
13 intent to cause confusion. See Century 21 Real Estate Corp., 846 F.2d 1175, 1178 (9th Cir
14 1988). Where the alleged infringer adopts a mark that is similar to the registered mark, a
15 court must presume that the public will be deceived. See Id. However, when a party presents
16 evidence of actual confusion, likelihood of confusion is presumed. See Fuddruckers Inc. v.
17 Doc's B.R. and Others, Inc. 826 F.2d 837, 845 (9th Cir. 1987).

19 The first factor in the Sleekcraft analysis is the similarity of the marks. The "similarity
20 of the marks" factor compares the marks in terms of "sight, sound and meaning." Sleekcraft at
21 351. The dominant feature of the marks at issue here is the words themselves: SKYDIVE
22 ARIZONA and ARIZONA SKYDIVING COOLIDGE. The only change in the words is the
23 addition of the geographic modifier "Coolidge" to Defendant's mark. Furthermore, Plaintiff
24 has submitted evidence that the Defendant's facility was often referred to as simply
25 "ARIZONA SKYDIVING" as opposed to ARIZONA SKYDIVING COOLIDGE.

27 The second factor in the likelihood of confusion analysis is the relatedness of the two
28 companies' services. Here, the services offered by the parties are nearly identical.

1 SKYDIVE ARIZONA and ARIZONA SKYDIVING COOLIDGE are geographically very
2 close to one another, approximately twenty miles away. Considering that SKYDIVE
3 ARIZONA draws customers from around the world, and that the two facilities are within 20
4 miles from each other, this distance is quite small. Furthermore, while the facilities are
5 different, the main service of providing skydiving opportunities are identical. Thus, the
6 services offered by Defendant were very close to those offered by Plaintiff, both
7 geographically and functionally.
8

9 The third Sleekcraft factor is the marketing channels used by the parties. Both parties
10 market their services in a variety of ways, but primarily through advertisements in print media
11 with broad circulation, as well as on the internet.
12

13 The fourth factor the Court must consider is the strength of Plaintiff's mark. Here, the
14 Plaintiff's mark is arguably weak. First, the mark is geographically descriptive. Secondly, the
15 mark contains a generic term describing the service of skydiving. However, the Plaintiff has
16 submitted evidence to show that he has devoted significant dollars and years to developing the
17 strength of its mark. The Plaintiff has also submitted evidence to show that it has established
18 an international reputation in the skydiving industry based on the quality of its services and
19 through extensive advertising.
20

21 The fifth factor in the Sleekcraft likelihood of confusion analysis is evidence of actual
22 confusion. The Plaintiff has submitted evidence of actual confusion. The Defendant has said
23 that he is not aware of any confusion. Whether Defendant was aware of confusion or not is
24 irrelevant. The Plaintiff has submitted mis-mailed letter sand testimony of community
25 members to prove that actual confusion existed. The Defendant has not submitted any
26 evidence to the contrary, but rather, has relied on its evidentiary objections to have the
27 evidence stricken. Furthermore, it appears from Plaintiff's evidence that confusion existed
28

1 amongst members of the community, potential customers, designers of various internet sites,
2 local safety personnel, and members of the Skydiving community.

3 The Sixth factor for consideration is the intent of the Defendant in selecting the mark.
4 The Plaintiff has suggested that the Defendant selected the mark in bad faith and for ill
5 purposes. The Defendant denies any intent to infringe on Plaintiff's mark, explaining that its
6 choice of name was motivated by the desire to appear first in the yellow pages and so that the
7 name would be descriptive of the type and location of the services. To some extent, this
8 factor remains in dispute. However, as noted infra, disputes of fact as to the intent and
9 motivation of the parties will not preclude summary judgment.
10

11 The seventh Sleekcraft factor, the likelihood of expansion into other markets, does not
12 apply when the parties are already competitors. See GoTo.com, 202 F.3d 1199,1200 (9th Cir.
13 2000). It is undisputed that the parties were in competition during the relative time period.
14 Thus, the seventh factor is not relevant here.
15

16 The eighth factor, the degree of care likely to be exercised by purchasers, also has
17 little application to this case. Neither party has presented evidence on the care likely to be
18 exercised by their customers. While it is presumed that customers would use considerable
19 care when deciding between the parties' companies, given their services involve jumping from
20 airplanes, the Court will not speculate about the care used by customers absent admissible
21 evidence submitted by the parties.
22

23 The multi-factor likelihood of confusion analysis, described above, does not require
24 that a plaintiff satisfy every prong. Rather, the factors are considered as a whole, and the test
25 is a "pliant" one where some factors may be much more important than others.

26 Brookfield[need full cite], 174 F.3d at 1054; See Also GoTo.com, 202 F.3d 1199, 1201 (9th
27
28

1 Cir. 2000). Furthermore, the list is not exhaustive or exclusive, but rather, the factors are to
2 be used as a guide. See Accuride 871 F.2d 1531, 1534 and N.1 (9th Cir. 1989).

3
4 In sum, Plaintiff's case appears strong under the similarity of mark, similarity of
5 services, marketing channels used and actual confusion factors. Defendant's case appears
6 strong on the strength of the mark factor. The intent factor is neutral, as the evidence on that
7 factor is in dispute. The likelihood of expansion into other markets, does not apply to this
8 case, and the factor regarding degree of care used also does not apply.

9
10 The Defendant has failed to establish a genuine issue for trial in its opposition. For
11 example, to refute a finding of actual confusion, the defendant argues that he did not know of
12 any confusion, and thus, the lack of evidence suggests there was no confusion. The
13 Defendant fails, however, to show how Plaintiff's evidence is not enough to establish actual
14 confusion. While the Plaintiff has only submitted a limited number of letters mailed to the
15 wrong location, which would not be sufficient to establish actual confusion alone, the Plaintiff
16 has also offered testimony of former and current employees, competitors and members of the
17 community that state that they were personally confused or witnessed incidents of confusion.
18 Furthermore, the Plaintiff filed documents proving confusion on various internet sites and
19 though minimal, some testimony of a wrongful intent¹.

20
21
22 Even taking all of the evidence in the light most favorable to the Defendant, the Court
23 finds that a ruling in Plaintiff's favor on both Motions for Summary Judgment on the
24 Trademark Infringement Claims is appropriate as a matter of law.
25
26
27

28 ¹Discussed, *Supra*, in "Damages" Section

1 **Defendant's Motion for Summary Adjudication That All Forms of Monetary Award to**
2 **the Plaintiff are Barred and Damages.**
3

4 As a preliminary matter, the Defendant's Motion is based on belief that absent a
5 showing of intentional infringement, a preliminary injunction is the sole remedy available to a
6 Plaintiff. However, in Lindy Pen Company v. Bic Pen Company, the Ninth Circuit explicitly
7 rejected a rule stating that injunctive relief is a sole and exclusive remedy under any
8 circumstances. See 982 F.2d 1400, 1404 (9th Cir. 1993). Rather, the Court repeatedly noted
9 that a monetary award is within the discretion of the trial court. See Id. Thus, for reasons
10 discussed further below, Defendant's Motion "That All Forms of Monetary Award to the
11 Plaintiff Are Barred" will be denied.
12

13
14 Section 35 of the Lanham Act, 15 U.S.C. § 117(a) governs the award of monetary
15 relief in a trademark infringement action. Section 117 (a) provides:

16 A trademark registrant shall be entitled, upon the finding of
17 infringement and subject to the principles of equity, to recover: (1) defendant's
18 profits, (2) any damages sustained by the Plaintiff, (3) the costs of the actions.
19 The Court shall assess such profits and damages or cause the same to be
20 assessed under its discretion. In assessing profits the plaintiff shall be required
21 to prove defendant's sales only; defendant must prove all elements of cost or
22 deduction claimed. In assessing damages, the court may enter judgment,
23 according to the circumstances of the case, for any sum above the amount
24 found as actual damages, not exceeding three times such amount. If the court
25 shall find that the amount of recovery based on profits is either inadequate or
26 excessive the court may in its discretion enter judgment for such sum as the
27 court shall find to be just. Such sum in either of the above circumstances shall
28 constitute compensation and not a penalty. The court, in exceptional cases may
award reasonable attorney's fees to the prevailing party.

1 In trademark cases, once a plaintiff establishes likelihood of confusion, irreparable
2 harm is presumed. See GoTo.com, 202 F.3d 1199, 1202 (9th Cir. 2000) (holding "a plaintiff
3 is therefore entitled to a preliminary injunction in a trademark case simply when it shows a
4 likelihood of success on the merits," because "irreparable injury may be presumed").

5
6 A district court may grant injunctive relief to prevent trademark infringement and
7 unfair competition. 15 U.S.C. § 1116 (a); Century 21 Real Estate Corp. v. Sandlin, 846 F.2d
8 1175, 1180 (9th Cir. 1988). Further, the Lanham Act protects trademark holders from
9 falsehoods or misrepresentations which "are likely to cause confusion, or to cause mistake, or
10 to deceive as to the affiliation, connection, or association of [one] person with another person,
11 or as to the origin, sponsorship, or approval of his or her goods, services, or commercial
12 activities by another person" 15 U.S.C. § 1125(a) (1994). The Act was designed to
13 prevent sellers from confusing buyers. NEC Electronics v. Cal Circuit ABCO, 810 F.2d 1506,
14 1509 (9th Cir.), cert. denied, 484 U.S. 851 (1987) (citing Prestonites, Inc. v. Coty, 264 U.S.
15 359, 368-69 (1924)).

16
17 Ordinarily, the Plaintiff would be entitled to a preliminary injunction at this stage.
18
19 However, since the time the case was filed, the Defendant has sold ARIZONA SKYDIVING
20 COOLIDGE and the new owner has changed the name of the business. Thus, a preliminary
21 injunction is not possible.

22
23 As noted above, the Defendant seized operation of its business and is no longer
24 affiliated with skydiving in Arizona. Additionally, on February 13, 2004 the Defendant filed
25 Notice of its voluntary surrender of its trademark registration of AZ Skydiving Coolidge (Reg
26 2,627,000) from the secondary registry. Thus, the Plaintiff's prayer for injunction is moot, and
27 will be denied as such.
28

1 Both the Lanham Act and the Copyright Act provide for an award of statutory damages
2 for willful trademark and copyright infringement. See 15 U.S.C.A. §1117(c). Thus, a
3 Plaintiff who can prove willfulness is also subject to monetary damages. However, a Plaintiff
4 does not have to prove intent to recover monetary damages, and the Court does not *have* to
5 award them, but *may*.

7 A determination of damages is left to the sound discretion of the trial Court. Lindy Pen.
8 Bic Pen Co., 982 F.2d 1400, 1404 (9th Cir. 1993). "A determination fo damages in a
9 trademark infringement action, including an accounting, it to be pursued in light of equitable
10 considerations." Maier Brewing Co. v. Fleischman Distilling Corp. 390 F.2d 117, 120 (9th Cir.
11 1968). The equitable limitation upon the granting of monetary awards ...would seem to make
12 clear that such a remedy should not be granted as a matter of right." Id. Section 35 of the
13 Lanham Act, 15 U.S.C. §117(a), governs the award of monetary remedies,

15 Furthermore, the Court must consider the nature of the infringing actions, including
16 intent with which they are motivated and the actuality, if any, of their adverse effects upon the
17 aggrieved party." Bandag, Inc. v. Al Bolster's Tire Stores, 750 F.2d 903, 918 (Fed Cir.
18 1984)(applying Ninth Circuit Law). See Also Highway Cruisers of California. Inc. v. Security
19 Industries, Inc. 374 F.2d 875, 876 (9th Cir. 1967) ("One may get just enough relief to stop the
20 evil..."). Willful infringement may support an award of profits, but does not require one. See
21 Faberge.

23 CONCLUSION

24 The underlying facts of this case are somewhat unique. During the relevant time
25 period, the Plaintiff and Defendant operated businesses 20 miles apart and provided almost
26 exactly the same services. The Plaintiff has formerly operated out of the location that the
27 Defendant eventually operated out of, and the Plaintiff submitted at least some evidence to
28

1 indicate that it had been referred to as the exact name that Defendant eventually adopted. The
2 Business cites were located in a remote area of the State near seemingly tight knit
3 communities, but much of the parties' clientele traveled from outside the area to use the
4 services. Thus, the parties had to engage in substantial advertising to recruit customers to the
5 area. Besides the fact that the parties were in direct competition, some evidence indicates that
6 it was not "friendly competition."
7

8 In addition to a unique factual background, this case also involves a unique procedural
9 background. To start, almost all of the Defendant's evidence was deemed inadmissible due to
10 untimely disclosure. Furthermore, the most compelling evidence that each side has is
11 testimony of the parties themselves, as no survey was ever conducted in the case. The
12 Defendant filed multiple Motions for Summary Judgment accompanied by multiple
13 statements of fact, leaving the Court with the difficult task of determining which Motion had
14 what admissible evidence remaining to support it. Additionally, the Defendant filed his own
15 objections to the evidence filed in support of the Plaintiff's Motion, some with merit, but most
16 lacking a compelling reason to deny admission as the Court will eventually serve as the trier
17 of fact and Rules formed to protect against juror prejudice are inapplicable.
18
19

20 After submission of over fifty voluminous pleadings pertaining to Summary Judgment
21 Motions, the Court was left with a "he said, he said" argument about whether Arizona
22 Skydiving, a business no longer in operation, infringes on Skydive Arizona's rights.
23

24 The Court's Ruling today is specifically limited by the unique factual and procedural
25 background of the case. The holding does not expand the requirements for showing
26 secondary meaning or trademark infringement. In fact, the Court would have no ability to do
27 so as it must follow the precedent of the Circuit. Rather, the holding today is a reflection of
28

1 the unique evidence left before the Court and the equitable findings as a matter of law after
2 consideration of that evidence. The Court finds that the Plaintiff has made the minimal
3 showing of owning a protectable mark and of infringement on that mark by the Defendant.
4 Furthermore, the Court finds that even when taking all of the evidence in the light most
5 favorable to the Defendant, the Defendant has failed to establish a genuine issue of material
6 fact and Summary Judgment is appropriate in Plaintiff's favor as a matter of law.
7

8 **ORDER**

9 Accordingly,

10 **IT IS ORDERED** that Plaintiff's Motion in limine to exclude evidence [Doc. No. 84]
11 is **GRANTED**;

12
13 **IT IS FURTHER ORDERED** that DECLARATION OF JARED DOUGLASS,
14 DECLARATION OF MICHAEL LAWRENCE; DECLARATION OF THOMAS L.
15 O'BRIEN; TRADEMARK RESEARCH REPORT; EXHIBIT A TO THE DECLARATION
16 OF MIKE MULLINS; PAGE 2 OF EXHIBIT B TO DECLARATION OF MIKE MULLINS;
17 EXHIBIT C TO DECLARATION OF MIKE MULLINS, EXHIBIT D TO DECLARATION
18 OF MIKE MULLINS; DECLARATION OF VICKY BOLDRINI; "90 PAGES OF
19 EXHIBITS" are **STRICKEN**.
20
21

22 **IT IS FURTHER ORDERED** that Defendants' Motion to strike Declarations [75],
23 [74], [73], [72], [71], [70], [69], [68], [67] and [66] [Doc. No. 87] is **GRANTED IN PART**
24 and **DENIED IN PART**;

25
26 **IT IS FURTHER ORDERED** that Declaration of Ben Cruz is **STRICKEN** from the
27 record.
28

1 **IT IS FURTHER ORDERED** that Defendants Motion to strike exhibits [85-1] is
2 **GRANTED IN PART** and **DENIED IN PART**;

3
4 **IT IS FURTHER ORDERED** that Plaintiff's Exhibits [1], [2], [49], [50], and [52],
5 are **STRICKEN** from the record;

6
7 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Adjudication on
8 Claims Barred by Statute of Limitations [Doc. No. 55-1] is **DENIED**;

9 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Judgment on the
10 Dilution claim is **GRANTED**;

11
12 **IT IS FURTHER ORDERED** that Defendant's Motion for Summary Adjudication
13 that all forms of monetary award to the Plaintiff are barred [Doc. No. 54-1] is **DENIED**.

14 **IT IS FURTHER ORDERED** that Plaintiff's Motion for Summary Judgment on
15 Trademark Infringement Claim is **GRANTED**;

16
17 **IT IS FURTHER ORDERED** that in light of this ruling, the parties shall file
18 supplemental pleadings to brief the court on the issues of damages only. The Plaintiff shall
19 submit a brief setting forth its arguments and evidence as to whether it actually suffered
20 damages, and if so, to what extent. In the alternative, the Plaintiff is granted leave submit an
21 argument based on a theory of unjust enrichment to the Defendant. The Plaintiff shall only
22 rely upon admissible evidence concerning the relevant time period. The Plaintiff shall not
23 rely upon inadmissible hearsay evidence, or any other evidence that is inadmissible under the
24 Federal Rules of Evidence. The briefing shall include a separate statement of facts. The
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1 brief shall not contain any footnotes in excess of five (5) lines. The Plaintiff shall file its brief
2 with the clerk of the Court on or before May 7, 2004.

3
4 **IT IS FURTHER ORDERED** the Defendant shall file a responsive briefing with the
5 Clerk of the Court on or before June 7, 2004. The responsive briefing shall set forth counter-
6 arguments on the issue of damages only. The responsive briefing shall only rely on
7 admissible evidence disclosed before the discovery cut-off date. The Defendant shall provide
8 the Court with a clear citation as necessary. The brief shall not contain any footnotes in
9 excess of five (5) lines.
10

11 **IT IS FURTHER ORDERED** the Court will not allow a Reply.

12
13 **IT IS FURTHER ORDERED** that unless otherwise noted in this Order, the briefs
14 shall be filed in accordance with the Rules on Motions for Summary Judgment. The briefings
15 shall not exceed the page limits allowed by the rules, nor is any party granted leave to file
16 more than one briefing.

17
18 **IT IS FURTHER ORDERED** in light of the Defendant's lawyers having withdrawn
19 from representation, the Court will give the Defendant some guidance on Motions Practice in
20 the District of Arizona. The Defendant is warned, however, that this guidance is not all
21 inclusive and that all parties, including those appearing Pro Se, must follow all Local and
22 Federal Rules of Civil Procedure.
23

24 It is Defendant's obligation to timely respond to all motions. The failure of Defendant
25 to respond to Plaintiff's Motions may, in the discretion of the Court, be deemed a consent to
26 the granting of that Motion without further notice, and judgment may be entered in favor of
27 the Plaintiff. See Brydges v. Lewis, 18 F.3d 651 (9th Cir. 1994) (*per curiam*).
28

1 **IT IS FURTHER ORDERED** that the Defendant shall take Notice of the following
2 applicable local rules.

3
4 Local Rule 1.10(l) of the Rules of Practice of the United States District Court for the
5 District of Arizona also requires, in addition, that you include as a part of your opposition to a
6 Motion for Summary Judgment a separate statement of facts in opposition to the Motion for
7 Summary Judgment.
8

9 (1) Any party filing a motion for summary judgment shall set forth separately
10 from the memorandum of law, and in full, the specific facts on which that party
11 relies in support of the motion. The specific facts shall be set forth in serial
12 fashion and not in narrative form. As to each fact, the statement shall refer to a
13 specific portion of the record where the fact may be found (i.e., affidavit,
14 deposition, etc.). Any party opposing a motion for summary judgment must
15 comply with the foregoing in setting forth the specific facts, which the opposing
16 party asserts, including those facts which establish a genuine issue of material
17 fact precluding summary judgment in favor of the moving party. In the
18 alternative, the movant and the party opposing the motion shall jointly file a
19 stipulation signed by the parties setting forth a statement of the stipulated facts
20 if the parties agree there is no genuine issue of any material fact. As to any
21 stipulated facts, the parties so stipulating may state that their stipulations are
22 entered into only for the purposes of the motion for summary judgment and are
23 not intended to be otherwise binding.

24 Additional provisions of Rule 1.10, Rules of Practice of the United States District
25 Court for the District of Arizona are as follows:

26 Subparagraph (e) of that Rule provides:

27 Unless otherwise permitted by the Court, a motion including its supporting
28 memorandum, and the response including its supporting memorandum, each
shall not exceed fifteen (15) pages, exclusive of attachments and any required
statement of facts. Unless otherwise permitted by the Court, a reply including
its supporting memorandum shall not exceed ten (10) pages, exclusive of
attachments.

Subparagraph (i) of Rule 1.10 provides:

1 If a motion does not conform in all substantial respects with the requirements of
2 this Rule, or if the opposing party does not serve and file the required answering
3 memoranda, or if counsel for any party fails to appear at the time and place
4 assigned for oral argument, such non-compliance may be deemed a consent to
5 the denial or granting of the motion and the court may dispose of the motion
6 summarily.

7 **IT IS FURTHER ORDERED** that the Clerk of the Court shall send copies of this
8 Order to Plaintiff's Counsel, and the Defendant, now appearing pro se.

9
10 DATED this 26 day of March, 2004.

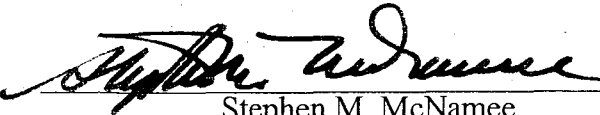
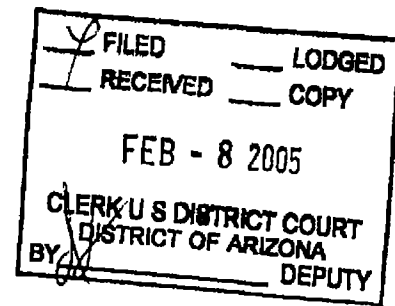
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13 Stephen M. McNamee
14 Chief United States District Judge
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Exhibit B

FILED _____ LODGED _____
RECEIVED _____ COPY _____
FEB - 8 2005
CLERK U S DISTRICT COURT
DISTRICT OF ARIZONA
BY _____ DEPUTY

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Exhibit C



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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SKYDIVE ARIZONA, L.L.C.,

Plaintiff,

vs.

MIKE MULLINS, d/b/a ARIZONA
SKYDIVING,

Defendant.

No. CIV 01-1854-PHX-SMM

ORDER

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Pending before the Court are the parties' briefs on damages in this matter [Doc. Nos. 119, 125]. On March 26, 2004, this Court granted summary judgment in favor of Plaintiff on its trademark infringement claim. Also on March 26, 2004, the Court instructed the parties to submit briefs on the issue of damages, which Plaintiff and Defendant timely submitted on May 7, 2004, and June 4, 2004, respectively. The Court now considers the arguments raised in the parties' briefs, and makes the following rulings.

BACKGROUND

Skydive Arizona is a limited liability corporation established under the laws of Arizona whose principle place of business is in Arizona. Plaintiff has been in the business of providing skydiving services since 1986. Originally, Skydive Arizona was located at the Coolidge Airport in Coolidge, Arizona. Plaintiff has adopted the mark, "Skydive Arizona" in connection with its services and painted its aircraft with its name in a unique pattern and distinct colors. Furthermore, Plaintiff advertised its services in various media, including newspapers, magazines, telephone directories, and the Internet. Skydive Arizona offers instructional

1 skydiving skills at all levels, serves as a training facility for professional skydivers, and has
2 hosted numerous national and world skydiving competitions. In 1991, Skydive Arizona
3 relocated to Eloy, Arizona, a location approximately 20 miles from the Coolidge airport. Since
4 1991, Skydive Arizona has hosted numerous skydiving competitions and has gained substantial
5 fame in the niche market of skydiving services. According to both parties, Skydive Arizona has
6 developed a reputation for providing high-quality skydiving services.

7 Defendant Mike Mullins' primary place of residence is Germantown, Tennessee.
8 Defendant has owned and operated a skydiving facility near Memphis, Tennessee under the
9 service mark "West Tennessee Skydiving" since 1989. The Defendant is an experienced pilot
10 for Federal Express and operates a skydiving aircraft. The Tennessee business provides
11 instructional services and serves as a training facility for skydivers throughout the United States
12 and from many foreign countries. In December of 1998, Mullins established a competing
13 skydiving business located in Coolidge, Arizona, under the mark "Arizona Skydiving
14 Coolidge." Furthermore, Defendant registered the domain name "www.arizonaskydiving.com"
15 at that time.

16 Mullins operated the Arizona facility during the winter months (December through April)
17 from 1998 to 2002. In May 2002, Mullins sold his skydiving business to Mark Hogue who
18 changed the name of the business to "Coolidge Skydiving."

19 On September 28, 2001, Skydive Arizona initiated this lawsuit, alleging trade name
20 infringement under the Lanham Act § 43(a), trade name dilution under the Lanham Act § 43(c)
21 and Arizona statute, and Arizona common law trade name infringement. On March 26, 2004,
22 this Court granted summary judgment in favor of Plaintiff on the trademark infringement claim,
23 and in favor of Defendant on the trade name dilution claim. The Court requested the parties file
24 briefs on the issue of damages, with leave to include a theory of unjust enrichment. The Court
25 now considers the parties' briefs on the issue of damages.

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STANDARD OF REVIEW

A determination of damages in a trademark infringement action is left to the sound discretion of the trial court. Lindy Pen Company, Inc. v. Bic Pen Corp., 982 F.2d 1400, 1404 (9th Cir. 1993). A determination of damages in a trademark infringement action, including an accounting, it to be pursued in light of equitable considerations. Maier Brewing Co. v. Fleischman Distilling Corp., 390 F.2d 117, 120 (9th Cir. 1968). "The equitable limitation upon the granting of monetary awards . . . would seem to make it clear that such a remedy should not be granted as a matter of right." Id. The Lanham Act, specifically 15 U.S.C. § 1117(a), governs the award of monetary remedies in a trademark infringement action. Section 1117(a) provides:

[A trademark registrant] shall be entitled, [upon the finding of infringement], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

Furthermore, the Court must also "consider the nature of the infringing actions, including the intent with which they were motivated and the actuality, if any, of their adverse effects upon the aggrieved party." Bandag, Inc. v. Al Bolster's Tire Stores, Inc., 750 F.2d 903, 918 (Fed. Cir. 1984) (applying Ninth Circuit Law); see also Highway Cruisers of California, Inc. v. Security Industries, Inc., 374 F.2d 875, 876 (9th Cir. 1967) ("One may get just enough relief to stop the evil"). "Willful infringement may support an award of profits, but does not require one." Faberge, Inc. v. Saxony Products, Inc., 605 F.2d 426, 429 (9th Cir. 1979) (citations omitted).

DISCUSSION

Plaintiff seeks damages for trademark infringement on a variety of different theories. Specifically, Plaintiff argues for the award of damages on (1) an unjust enrichment theory, (2) alternatively, lost revenues due to diverted customers, (3) lost profits due to price erosion, (4)

1 damage to goodwill, and (5) the costs of pursuing this action. However, prior to assessing the
2 viability of any of Plaintiff's computational theories, the Court must first address whether
3 damages, of any amount, are warranted here.

4 Defendant asserts that an award of damages is not appropriate because (1) Plaintiff failed
5 to disclose information and supporting documentation in support of a damages claim as required
6 by Fed. R. Civ. P. 26(a)(1)(C), and (2) laches bars such an award here. Further, the award of
7 damages is discretionary in a trademark infringement action, and the Court must address several
8 considerations in its determination on the propriety of a damages award.

9 **A. Fed. R. Civ. P. 26(a)(1)(C)**

10 Rule 26(a)(1)(C) states: "a party must, without awaiting a discovery request, provide to
11 other parties . . . a computation of any category of damages claimed by the disclosing party,
12 making available for inspection and copying . . . the documents or other evidentiary material
13 . . . on which such computation is based" Rule 37(c)(1) gives teeth to the provisions of
14 Rule 26 by providing: "[a] party that without substantial justification fails to disclose
15 information required by Rule 26(a) . . . is not, *unless such failure is harmless*, permitted to use
16 as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed."

17 Here, to the extent Plaintiff did in fact fail to detail its damage calculations during the
18 discovery process under Rule 26, the Court finds that such failure was harmless. At issue now
19 is the determination of damages based on Defendant's gross profits. During the discovery
20 process, Defendant identified its gross profits as \$630,765. This is undisputed. Plaintiff seeks
21 to recover the entire amount as damages, subject to any deductions Defendant may establish.
22 As such, there is no question as to how Plaintiff arrived at the amount of damages requested,
23 nor is there a question as to its validity. To the extent Defendant believes he has been
24 prejudiced by Plaintiff's lack of disclosure, the Court finds that any such prejudice is fully
25 remedied by the brief filed by Plaintiff which details the damages sought, and the basis for
26 seeking such damages – to which Defendant was able to fully respond. There is no need here
27 for Plaintiff to make available documents or evidentiary material more so than has already been
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1 done, as it is the disclosed profits of Defendant that shape this damages claim. Accordingly,
2 the Court must find that an award of damages will not be defeated by Plaintiff's failure to fully
3 comply with Rule 26, as such failure was harmless under Rule 37 in light of the additional
4 damages briefing ordered by the Court.

5 ***B. Laches***

6 Defendant asserts that Plaintiff delayed two years and ten months before giving notice
7 of the infringing activity, which in turn significantly prejudiced Defendant. Consequently,
8 Defendant argues, the defense of laches bars the award of any damages here.

9 "Laches is an equitable time limitation on a party's right to bring suit," Boone v. Mech.
10 Specialties Co., 609 F.2d 956, 958 (9th Cir. 1979), resting on the maxim that "one who seeks
11 the help of a court of equity must not sleep on his rights." Piper Aircraft Corp. v. Wag-Aero,
12 Inc., 741 F.2d 925, 939 (7th Cir. 1984) (Posner, J., concurring). It is well established that
13 laches is a viable defense to Lanham Act claims, include trademark infringement. See, e.g.,
14 GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1209 (9th Cir. 2000). A party asserting
15 laches as a defense must show that it suffered prejudice as a result of unreasonable delay in
16 filing suit. Couveau v. American Airlines, Inc., 218 F.3d 1078, 1083 (9th Cir. 2000).

17 In Jarrow Formulas, Inc. v. Nutrition Now, Inc., 304 F.3d 829, 837 (2002), the Ninth
18 Circuit joined its sister circuits in holding that there is a strong presumption that laches is
19 inapplicable to a claim filed under the Lanham Act within the analogous statute of limitations
20 period. Here, Defendant claims Plaintiff delayed two years and ten months, from the beginning
21 of Defendant's operations in December 1998 to the commencement of this action on September
22 28, 2001. Even assuming Defendant's calculation is correct, and without regard to the on-going
23 nature of the infringement, the Court finds a delay of two years and ten months here is
24 insufficient for a viable defense of laches under Jarrow Formulas. As set forth in the previous
25 Order of the Court, the analogous statute of limitations is three years for this infringement
26 action. [Doc. No. 118 at 13]. Accordingly, Plaintiff's delay was less than the three year period
27 by two months under Defendant's own calculations, and therefore there is a strong presumption
28

1 that Plaintiff's delay is insufficient to trigger the defense of laches. However, the Court
2 proceeds to evaluate Defendant's laches defense to determine whether it can overcome this
3 presumption.

4 In E-Systems, Inc. v. Monitek, Inc., 720 F.2d 604, 607 (9th Cir. 1983), the Ninth Circuit
5 "set out six factors for determining whether laches bars a claim for either damages or injunctive
6 relief in an action for trademark infringement:

- 7 1: strength and value of trademark rights asserted;
- 8 2: plaintiff's diligence in enforcing the mark;
- 9 3: harm to senior user if relief denied;
- 10 4: good faith ignorance by junior user;
- 11 5: competition between senior and junior uses; and
- 12 6: extent of harm suffered by junior user because of senior user's delay."

13 See also Grupo Gigante SA De CV v. Dallo & Co., Inc., 391 F.3d 1088, 1101-02 (9th Cir.
14 2004). On balance, application of these considerations here does not overcome the strong
15 presumption that laches is inapplicable under Jarrow Formulas.

16 This Court has previously held that Plaintiff's mark is weak because it is geographically
17 descriptive and describes the general service of skydiving, and accordingly the first factor
18 favors Defendant. [Doc. No. 118 at 23]. Further in favor of Defendant is factor six, as
19 Defendant operated his business for almost three years, and invested significant amounts of
20 money in his business, before Plaintiff decided to challenge the infringing activity. As such,
21 Defendant is prejudiced by Plaintiff's delay as the time, money, and effort invested would now
22 be subject to a damages claim in the absence of laches. However, the remainder of the factors
23 favor Plaintiff.

24 Should damages be denied, Plaintiff would suffer the harm of both lost profits as a result
25 of the infringing activity and the costs of pursuing this action. While injunctive relief is
26 inapplicable because Defendant has since sold the business, which now operates under a new
27 mark, damages would mend the financial harm caused during the operation of the infringing
28 activity. Consequently, factor three favors Plaintiff. Similarly, factor five works against the
imposition of laches, as the parties' businesses were in direct competition during the period of
the infringing activity. The proximity of the businesses, and their parallel services placed them

1 squarely in competition with one another. Factor four also favors Plaintiff because it is
2 axiomatic from the facts and circumstances of this case that Defendant intended to profit from
3 the established mark of Plaintiff. Yet, it is factor two that raises the most critical inquiry at
4 issue here, namely, whether Plaintiff's delay was extensive enough, in light of the prejudice
5 caused, to warrant laches as a defense. Clearly, under Jarrow Formulas, it was not.

6 Further, the Court is cognizant that laches operates to bar the underlying suit, rather than
7 a damages claim where the underlying infringement has already been found viable -- as is the
8 case here. Defendant's laches defense would have been better suited, albeit unsuccessfully, to
9 the disposition of this matter as argued on summary judgment. In either case however, laches
10 does not serve as a bar to suit or damages because Plaintiff initiated this action within the
11 analogous three-year statute of limitations period.

12 ***C. Discretionary Damages in Trademark Infringement Actions***

13 Having determined that Plaintiff's claim for damages is not barred, the Court proceeds
14 to determine whether damages may be appropriately imposed in light of equitable
15 considerations under relevant statutory and case law.

16 A determination of damages in a trademark infringement action is left to the sound
17 discretion of the trial court. Lindy Pen Company, Inc. v. Bic Pen Corp., 982 F.2d 1400, 1404
18 (9th Cir. 1993). The Ninth Circuit has held that where trademark infringement is deliberate and
19 willful, trial courts should impose such damages that take all of the economic incentive out of
20 trademark infringement. See Playboy Enterprises, Inc. v. Baccarat Clothing Co., Inc., 692 F.2d
21 1272, 1274-75 (9th Cir. 1982). "Willful infringement carries a connotation of deliberate intent
22 to deceive." Lindy Pen, 982 F.2d at 1406. "Willfulness and bad faith 'require a connection
23 between a defendant's awareness of its competitors and its actions at those competitors'
24 expense." Id. (citations omitted). The question now facing the Court is whether Defendant's
25 infringement was "willfully calculated to exploit the advantage of an established mark."
26 Bandag, Inc. v. Al Bolster's Tire Stores, Inc., 750 F.2d 903, 921 (Fed. Cir. 1984).

1 Here, the Court finds Defendant's infringing actions were willful. Defendant's argument
2 that he had a good faith belief that he was entitled to use the name Arizona Skydiving Coolidge,
3 and that such name did not present any conflict with Plaintiff's trade name, is simply untenable.
4 The record clearly shows Defendant was well aware of the notoriety of Plaintiff and Plaintiff's
5 mark in the skydiving business before selecting the infringing mark. Specifically, Defendant
6 identified in his "Separate Statement of Undisputed Material Facts in Support of Motion for
7 Summary Judgment on the Dilution Claim" that Plaintiff was renown for its services and that
8 Defendant was cognizant of not only Plaintiff's mark, but also its location and market presence.
9 Knowing of Plaintiff's successes, the facts evince Defendant moved to capitalize on such
10 success by establishing a business within twenty miles of Plaintiff, and invoking a confusingly
11 similar mark. Defendant's decision to begin operations in Coolidge, the former site of Plaintiff's
12 operations, and to select a mark confusingly similar to Plaintiff's, reveals a deliberate and
13 willful attempt "to exploit the advantage of an established mark." Bandag, Inc., 750 F.2d at
14 921. It is no defense for Defendant to claim he believed that he was entitled to use a
15 confusingly similar mark when the self-evident intent behind choosing such a mark was to
16 benefit from the advantages of Plaintiff's established mark. Because Defendant was very aware
17 of Plaintiff's successful business operations, including its location and mark, Defendant cannot
18 now successfully feign innocence, or ignorance, of willful infringement based on what he
19 thought he was entitled to do.

20 In reaching its determination of willfulness, the Court notes that its previous Order is
21 instructive. In granting summary judgment for Plaintiff on the infringement claim, the Court
22 found that there was evidence of actual confusion. [Doc. No. 118 at 23]. Of particular import
23 were mis-mailed letters and testimony of community members that actual confusion existed.
24 The Court stated "[f]urthermore, it appears from Plaintiff's evidence that confusion existed
25 amongst members of the community, potential customers, designers of various internet sites,
26 local safety personnel, and members of the Skydiving community." Id. Such evidence is
27 unsurprising given the facts and circumstances of Defendant's infringement, and only enlarges
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1 the "good faith belief" mountain Defendant attempts to climb by providing proof of the obvious
2 and inherent confusion caused by Defendant's infringing mark. The Court finds it implausible
3 that an active member of the skydiving community, such as Defendant, would fail to see the
4 conflict and confusion that would be, and was, brought on by the adoption of Defendant's
5 infringing mark. Accordingly, the Court finds that Defendant's conduct was willful.

6 Willful infringement may support an award of profits, but does not require one."
7 Faberge, Inc. v. Saxony Products, Inc., 605 F.2d 426, 429 (9th Cir. 1979) (citations omitted).
8 However, as previously mentioned, the Ninth Circuit has established a policy of imposing
9 remedies that remove the economic incentive from trademark infringement where the
10 infringement is deliberate and willful, going so far as to hold that the public is slighted by a trial
11 court's failure to impose damages in such situations. See Playboy Enterprises, Inc., 692 F.2d
12 at 1274-75; Maier Brewing Co. v. Fleischman Distilling Corp. 390 F.2d 117 (9th Cir. 1968).
13 In light of this Court's finding that Defendant acted willfully, it follows in the Ninth Circuit that
14 the imposition of damages is necessary, absent equitable circumstances that would lead the
15 Court to exercise its discretion to abstain from awarding damages. While the Court finds that
16 equitable considerations do exist here, their sum does not defeat an award of damages.
17 Accordingly, the Court proceeds to calculate the amount of damages appropriate here.

18 ***D. Damage Calculation***

19 The Lanham Act provides that "[a] trademark registrant shall be entitled, upon the
20 finding of infringement and subject to the principles of equity, to recover: (1) defendant's
21 profits, (2) any damages sustained by the Plaintiff, and (3) the costs of the action." 15 U.S.C.
22 § 1117(a). As a preliminary matter, the Court notes that its previous determination that
23 Plaintiff's mark was weak [Doc. No. 118 at 23], and Plaintiff's prejudicial delay in bringing this
24 suit, are equitable considerations that will be assessed in any discretionary damage calculation.

25 ***1. Defendant's Profits***

26 "Because proof of actual damage is often difficult, a court may award damages based on
27 defendant's profits on the theory of unjust enrichment." Lindy Pen Company, Inc., 982 F.2d at
28

1 1407. "In assessing profits the plaintiff shall be required to prove defendant's sales only;
2 defendant must prove all elements of cost or deduction claimed." 15 U.S.C. § 1117(a). Here,
3 it is undisputed that Defendant's gross profits totaled \$630,765. Accordingly, the burden is on
4 Defendant to offset that figure by proving costs.

5 During the four seasons Defendant operated Arizona Skydiving Coolidge, Defendant
6 claims an overall loss of \$224,265.05. Specifically, Defendant claims he lost \$127,595.80 in
7 the 1998 season; profited \$72,910.45 in the 1999 season; profited \$42,212.97 in the 2000
8 season; and lost \$211,792.67 in the 2001 season. Such loss/profit figures, and the basis for
9 those figures, were disclosed to Plaintiff prior to the discovery deadline. Further, Defendant
10 Mullins was questioned about these figures during his deposition. As such, Plaintiff was
11 sufficiently on notice to challenge Defendant's calculations, and did so in its damages brief.
12 While the Court is cognizant of Plaintiff's general objection to what it perceived to be "self-
13 serving" summaries of Defendant's expenses, Plaintiff specifically challenged several of those
14 expenses it deemed suspect. The Court now notes that Plaintiff's objection to Defendant's
15 claimed monthly "leasing" expense (which Plaintiff argued was paid to himself) is immaterial
16 as the Court is satisfied that Defendant used the term leasing interchangeably with monthly
17 installment payments on debt owed in the purchase of the aircraft. Because gross profits have
18 been conclusively established, it is now up to Defendant to prove its deductions. Defendant's
19 accounting of each season is addressed below.

20 *a. 1998 Season*

21 Defendant's claim that it lost \$127,595.80 during the 1998 season is challenged by
22 Plaintiff. Plaintiff asserts that Defendant claimed as a deduction from his profits \$118,054.28
23 that was spent repairing an aircraft engine. Plaintiff argues that because Defendant used his
24 aircraft for many other events, including use prior to the establishment of Arizona Skydiving
25 Coolidge and seasonal use at his other business, West Tennessee Skydiving, such a deduction
26 is not appropriate wholly from the profits of Arizona Skydiving Coolidge during the 1998
27 season.

1 However, regardless of whether the repair expenses were a proper deduction, Plaintiff
2 is only entitled to Defendant's profits under the express language of the Lanham Act.
3 Consequently, even assuming the entire amount of \$118,054.28 was an inappropriate deduction,
4 Defendant still incurred losses of \$9,541.52. Absent a showing of profit, Plaintiff may not
5 recoup damages for the 1998 season under the first prong of the Lanham Act, defendant's
6 profits.

7 ***b. 1999 Season***

8 Defendant asserts a profit of \$72,910.45 during the 1999 season. Plaintiff does not cite
9 any improper profit deductions. Therefore, keeping in mind the mandate of the Ninth Circuit
10 to remove all economic incentive from trademark infringement, Defendant's profits during the
11 1999 season shall be awarded to Plaintiff as damages for willful trademark infringement.

12 ***c. 2000 Season***

13 Defendant asserts a profit of \$42,212.97 during the 2000 season. Plaintiff does not cite
14 any improper profit deductions. Therefore, similarly to the 1999 season, keeping in mind the
15 mandate of the Ninth Circuit to remove all economic incentive from trademark infringement,
16 Defendant's profits during the 2000 season shall be awarded to Plaintiff as damages for willful
17 trademark infringement.

18 ***d. 2001 Season***

19 Defendant claims it suffered losses of \$211,792.67 during the 2001 season. Defendant
20 deducted from its profits \$190,000 for the purchase of a new aircraft engine, and \$66,683.85
21 for the disassembly of an aircraft engine. Plaintiff asserts these deductions are improper
22 because they cannot be wholly allocated to Arizona Skydiving Coolidge for the 2001 season.
23 Rather, Plaintiff argues, because Defendant used his planes at other locations throughout the
24 year and during previous years, and such maintenance and improvements would be expected
25 to last for years, the expenses cannot be wholly attributed to Arizona Skydiving Coolidge. The
26 Court agrees.

1 The Court finds that no more than 10% of the purchase price of an aircraft engine can
2 be allocated to the 2001 season of Arizona Skydiving Coolidge. Further, the Court finds that
3 no more than 35% of the expense of engine disassembly can be allocated to the 2001 season of
4 Arizona Skydiving Coolidge. Therefore, instead of deductions of \$190,000 and \$66,683.85,
5 the Court finds that \$19,000 and \$23,339.35 are proper expenses for the aforementioned items
6 in the 2001 season. Without any deductions for the engine purchase or disassembly price,
7 Defendant's profits for 2001 were \$44,891.18. Incorporating the new deductions into
8 Defendant's Profit & Loss Statement yields profits for 2001 totaling \$2,551.83. Such profits
9 shall be awarded to Plaintiff as damages for Defendant's willful trademark infringement.

10 ***e. Loss Offset***

11 Defendant argues that it should be permitted to offset its losses against its profits in other
12 years. However, the Ninth Circuit in Wolfe v. National Lead Co., 272 F.2d 867 (9th Cir. 1959),
13 held that a trademark infringer is not permitted to set off losses in certain years against profits
14 made in other years. Id. at 870. Defendant asserts that Wolfe is not controlling because there,
15 as opposed to here, the defendant was found to be a deliberate and fraudulent infringer.
16 However, as previously addressed, the Court has determined that Defendant willfully infringed
17 on Plaintiff's trademark, and thus Defendant's assertion fails. The Court finds Wolfe
18 controlling, and therefore Defendant will not be permitted to offset his profits by losses
19 sustained in other years. As such, Plaintiff shall be awarded \$117,675.25, which is the sum of
20 Defendant's profits during the operation of its infringing business, as previously determined by
21 the Court.

22 **2. *Damages Sustained by Plaintiff***

23 ***a. Lost Profits Due to Price Erosion***

24 Plaintiff claims that as a result of Defendant's infringing activity, it was forced to lower
25 its skydiving prices. Specifically, Plaintiff claims it had to offer jumps at \$10 instead of \$17
26 to compete with Defendant's infringing business. In support of its argument, Plaintiff cites
27 Century Distilling Co. v. Continental Distilling Corp., 86 F. Supp. 503 (E.D. Pa. 1949). The
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1 Court is unpersuaded by Century Distilling as it makes no mention of the Lanham Act, is
2 factually distinguishable, is not Ninth Circuit law, and is dated. A further review of the case
3 law reveals little support for a claim of damages for price erosion.

4 Additionally, the Court is not convinced that Plaintiff lowered its prices solely in
5 response to the competition offered by Defendant. There is some evidence that prices lower
6 than \$17 were offered by Plaintiff prior to the establishment of Arizona Skydiving Coolidge.
7 Further, a non-infringing similarly-situated competing business possibly would have resulted
8 in a lowering of prices as well. Therefore, in the absence of controlling case law and facts that
9 reveal a direct link between the infringing activity and price erosion, no damages shall be
10 awarded for Plaintiff's alleged lost profits due to price erosion.

11 ***b. Lost Revenues Due to Diverted Customers***

12 Plaintiff seeks, in the alternative to an award of Defendant's profits, to recover damages
13 for those revenues lost due to customers diverted to Arizona Skydiving Coolidge. Because the
14 Court previously awarded Plaintiff Defendant's profits, the Court will not allow, nor does
15 Plaintiff seek, double recovery through an award of lost revenues.

16 ***c. Damage to Goodwill***

17 Plaintiff maintains that it is also entitled to damages for injury to its goodwill. The
18 Court previously found that Plaintiff spent \$471,988 on advertising during the operation of
19 Defendant's infringing business. [Doc. No. 118 at 21]. Plaintiff believes its investment in
20 advertising has been undercut by the infringing activity by Defendant, and accordingly seeks
21 damages.

22 Plaintiff again cites Century Distilling to support its claim, and again the Court finds it
23 to be unpersuasive. Despite what the Eastern District of Pennsylvania may have held in 1949,
24 the Ninth Circuit has more recently held that remote and speculative damages may properly be
25 denied in trademark infringement actions. See Lindy Pen, 982 F.2d at 1407-08 (stating "a
26 reasonable basis for computation must exist," and "[m]any courts have denied a monetary award
27 in infringement cases when damages are remote and speculative."). Plaintiff states in its brief
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1 that "damages to goodwill are difficult to quantify." The Court agrees, in large part because
2 such damages are remote and speculative. Here, there is no evidentiary basis to award damages
3 as Plaintiff has failed to demonstrate injury to its goodwill. Without proof of a direct link
4 between the infringing activity and injury to goodwill, and without a reasonable basis to
5 compute money damages of such an injury, damages are not recoverable here for injury to
6 Plaintiff's goodwill.

7 3. *Costs of the Action*

8 The Lanham Act provides that the cost of a trademark infringement action may be
9 awarded in "exceptional cases." 15 U.S.C. § 1117(a). The award of costs is within the
10 discretion of the trial court. See Polo Fashions, Inc. v. Dick Bruhn, Inc., 793 F.2d 1132, 1134
11 (9th Cir. 1986).

12 While the Court is steadfast in its determination that Defendant's infringement was
13 willful, the Court does not believe that this is an exceptional case meriting an award of costs.
14 Here, Defendant provided a service whereby significant effort and resources were dedicated to
15 the successful operation of a business. The infringing activity resulted in bringing people
16 through the door, and is therefore less blameworthy than infringing activities which involve
17 mass-production of essentially counterfeit products. See Playboy Enterprises, 692 F.2d at 1276
18 (awarding attorneys fees where defendants "deliberately arranged to obtain counterfeit goods
19 and to sell such goods as genuine [] products"). Here, Defendants conduct was less flagrant,
20 and in light of Plaintiff's weak mark and delay in bringing suit, the Court cannot find that this
21 is an exceptional case by which costs should be awarded. Accordingly, Plaintiff shall not
22 recover the costs of this action, despite Defendant's willful infringement.

23 CONCLUSION

24 Plaintiff's claim for damages is not barred by either laches or non-compliance with Fed.
25 R. Civ. P. 26. Upon determining that Defendant's infringing activities were willful, the Court
26 finds, under the Lanham Act, that Plaintiff shall be awarded Defendant's profits during the
27 operation of the infringing business, totaling \$117,675.25. Further, Plaintiff has not asserted
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1 sufficient evidence or basis for damages it sustained, nor that this is an exceptional case in
2 which costs should be awarded.

3
4 Accordingly,

5 **IT IS THEREFORE ORDERED** damages are hereby awarded to Plaintiff in the
6 amount of \$117,675.25, which equals Defendant's profits during the period of the infringing
7 activity, as determined by the Court.

8 **IT IS FURTHER ORDERED** that Plaintiff shall recover the taxable costs of this action
9 pursuant to Federal Statute, as determined by the Clerk, but that Plaintiff's request for attorney's
10 fees is **DENIED**.

11 **IT IS FURTHER ORDERED** this matter is hereby terminated, and the Clerk shall enter
12 judgment accordingly.

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14 DATED this 1 day of February, 2005.

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19 Stephen M. McNamee
20 Chief United States District Judge
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Exhibit D

SETTLEMENT AGREEMENT

1. This is a Settlement Agreement between Skydive Arizona, Inc., an Arizona corporation, having a principal place of business at 4900 N. Taylor Road, Eloy, Arizona 85231 ("Skydive Arizona"), where Skydive Arizona conducts skydiving operations and runs a dropzone, Marc Hogue, an individual and resident of the State of Arizona, having a business address of 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228, where Marc Hogue now conducts skydiving operations and runs a dropzone, and Skydive Force, Inc., a corporation having a principal place of business at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228 (Marc Hogue and Skydive Force, Inc., are hereinafter collectively referred to as "Marc Hogue"). The effective date of this Settlement Agreement is ~~December 4, 2002~~. 1 JAN, 2003. (MAH) ~~MAH~~

2. Marc Hogue has entered into an agreement to purchase the business involving the skydiving operations previously conducted by Mike Mullins under the name of Arizona Skydiving at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228. Marc Hogue has paid valuable consideration to Mike Mullins pursuant to the purchase agreement, and has effectively taken over the skydiving operations of the business, except that the landlord has not yet approved the assignment of the lease to Marc Hogue. During the period that Marc Hogue has been operating the business, there have been occasions when customers have made a telephone reservation to do a tandem jump at either Arizona Skydiving or at Skydive Arizona, and have shown up at the other dropzone by mistake. Marc Hogue and Skydive Arizona desire to put an end to customer confusion between the two dropzones.

3. This Settlement Agreement is also intended to settle potential claims that Skydive Arizona may have against Marc Hogue in connection with the case of *Skydive Arizona, Inc. vs. Mike Mullins d/b/a Arizona Skydiving*, Civil Action No. CIV 01-1854 PHX SMM, in the United States District Court for the District of Arizona, but does not resolve any of the claims that Skydive Arizona may have against Mike Mullins.

4. Marc Hogue agrees to immediately change the name of his business to "Coolidge Skydiving," and will stop using the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving." As described more particularly below, Skydive Arizona will allow Marc Hogue a transition period to phase out use of the "Arizona Skydiving" name.

5. Skydive Arizona promises that it will not seek to add Marc Hogue as a party to the case of *Skydive Arizona, Inc. vs. Mike Mullins d/b/a Arizona Skydiving*, Civil Action No. CIV 01-1854 PHX SMM, in the United

States District Court for the District of Arizona, and will not sue Marc Hogue for an injunction or for damages for any claim of trademark infringement, trademark dilution, false designation of origin, or unfair competition based upon the use of the "Arizona Skydiving" name in connection with the business purchased by Marc Hogue from Mike Mullins.

6. Skydive Arizona agrees that Marc Hogue may continue to use existing manifest sheets, and printed material printed prior to the effective date of this Settlement Agreement, until Marc Hogue's current supply of such documents has been exhausted. Future printings of such manifest sheets will bear the new name of the business, and will not use the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving." Marc Hogue may similarly consume existing documents bearing the "Arizona Skydiving" name in his business until the supply of such documents is exhausted. Future printings of all such documents shall bear the new name of the business, and will not use the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving." Notwithstanding anything to the contrary herein, Marc Hogue agrees to cease using any documents bearing the "Arizona Skydiving" name within twelve (12) months from the Effective Date of this Settlement Agreement.

7. Marc Hogue agrees that he will immediately cease using the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving," in all promotional, marketing or advertising materials and ads, with the exception of those allowed in para. 6. Marc Hogue agrees that when it is time to renew his ad in the Yellow Pages, he will use the new name of his business in all future Yellow Pages ads, and will not use the name "Arizona Skydiving," or any name including the word "Arizona" in combination with any form of the word "Skydive" or "Skydiving," in future Yellow Pages ads. Marc Hogue agrees that, commencing immediately, the telephone at his business will be answered with the new name of the business.

8. The parties have reached a compromise concerning the domain name or website address of "www.arizonaskydiving.com" that is being used in connection with the business

involving the skydiving operations now being conducted by Marc Hogue at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228.

(a) As long as Marc Hogue has at least a 34% equity ownership of such business, and is responsible for and actively involved in the management of such business, Marc Hogue may continue to use the domain name or website address of "www.arizonaskydiving.com" in connection with such business involving the skydiving operations being conducted by Marc Hogue in Coolidge, Arizona. If either of those conditions cease to exist, (i.e., Marc Hogue no longer has at least a 34% equity ownership of such business, or is no longer responsible for and actively involved in the management of such business), then Marc Hogue agrees that the domain name or web site address of "www.arizonaskydiving.com" will be promptly assigned to Skydive Arizona.

(b) For so long as the domain name or website address of "www.arizonaskydiving.com" is used in connection with the business involving the skydiving operations conducted in Coolidge, Arizona, the first page that a user is directed to when the URL of "www.arizonaskydiving.com" is entered in any Internet browser software (and a user is connected to such web site address), including any web page designed as the "home" page for such web site, shall contain the following statement in a font and color that is reasonably readable and conspicuous: **"Not affiliated with Skydive Arizona. You can reach Skydive Arizona's web site by going to our 'Links' page under 'Resources.'"** However, if it becomes necessary or desirable for some future unforeseen reason to change the exact language of this statement, Marc Hogue may do so if he first obtains the approval of Larry Hill. In addition, the last two words of the statement, i.e., "...under 'Resources'," shall be changed if the organization of the web site

changes, and the "Links" page is no longer under the "Resources" menu, so that the statement will reflect the correct location of the "Links" page.

(c) For so long as the domain name or website address of "www.arizonaskydiving.com" is used in connection with the business involving the skydiving operations conducted in Coolidge, Arizona, the "Links" page for that web site shall contain a link to the Skydive Arizona web site at "www.skydiveaz.com" which is displayed using a font and color that are the same as the other links on the "Links" page. The following HTML code shall be used for this link: `Skydive Arizona`. However, additional HTML code may be included for the font and color of the displayed text, if desired, as long as the font and color are the same as the other links on the "Links" page. In addition, if it becomes necessary or desirable for some future unforeseen reason to change the exact HTML code used for the link to the Skydive Arizona web site, Marc Hogue may do so if he first obtains the approval of Larry Hill, and shall do so if he is requested by Larry Hill to change the HTML code, (for example, if the URL for the Skydive Arizona web site changes).

(d) For so long as (1) Marc Hogue has at least a 34% equity ownership of the business involving the skydiving operations now being conducted by Marc Hogue at 6300 North Airport Road, South Hanger, Coolidge, Arizona 85228, and is responsible for and actively involved in the management of such business, and (2) one or more aircraft owned by Larry Hill or Skydive Arizona is being regularly used for skydiving operations in connection with such business at the Coolidge, Arizona dropzone, Skydive Arizona will include a link to the web site at "www.arizonaskydiving.com" on the links page for

the Skydive Arizona web site (currently referred to as "Cool Links"), which is displayed using a font and color that are the same as the other links on such links page.

9. Marc Hogue agrees to promptly issue a press release announcing the change of name from "Arizona Skydiving" to "Coolidge Skydiving."

10. Nothing herein is to be construed as a license, either express or implied, under any trademark, service mark, trade name, or copyright owned by Skydive Arizona.

11. The parties acknowledge and agree that any breach of this Settlement Agreement will cause irreparable harm to the non-breaching party, and agree that the terms of this Settlement Agreement may be enforced by injunctive relief. In addition, in the event of a breach of this Settlement Agreement, the prevailing party shall be entitled to recover its attorneys fees and expenses. However, in the event of a breach of this Settlement Agreement, the non-breaching party shall give the breaching party notice of the breach, and a period of thirty (30) days to cure the breach, before taking legal action.

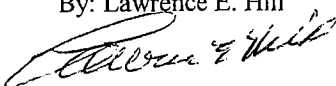
12. This Settlement Agreement constitutes the entire agreement between the parties with respect to the subject matter thereof. The undersigned have read the Settlement Agreement, fully understand its content, and have been advised by counsel of their own choosing as to the propriety and legal effect of executing same.

13. The undersigned acknowledge that this Settlement Agreement, and all questions relating to its validity, interpretation, performance and enforcement, shall be governed by and construed in accordance with the laws of the State of Arizona.

14. This Settlement Agreement shall be binding upon the parties, and their successors, heirs, devisees and assigns.

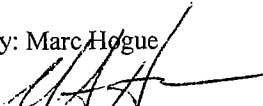
SKYDIVE ARIZONA, INC.

By: Lawrence E. Hill



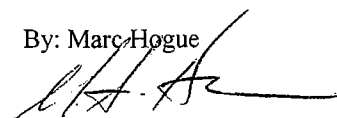
SKYDIVE FORCE INC.

By: Marc Hogue



Marc Hogue

By: Marc Hogue



5
EFFECTIVE - 030101

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SKYDIVE ARIZONA, INC.,)	
)	
Plaintiff,)	
)	
vs.)	NO. CIV 01-1854-PHX-SMM
)	
MIKE MULLINS d/b/a ARIZONA)	
SKYDIVING COOLIDGE,)	
)	
Defendant.)	
-----)	

DEPOSITION OF MIKE MULLINS

Phoenix, Arizona
March 13, 2003
8:00 a.m.

REPORTED BY:

JUDI A. WARMUTH, RPR
Certified Court Reporter
Certificate No. 50549

PREPARED FOR:

DISTRICT COURT

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I N D E X

WITNESS:	PAGE
MIKE MULLINS	
Examination by Mr. Leach	5

E X H I B I T S

12

13	EXHIBIT NO.	DESCRIPTION	MARKED
14	1	Copy of Lease (20 pgs.)	27
	2	Copy of Web page (1 pg.)	32
15	3	Arizona Skydiving Schedule (2 pgs.)	32
16	4	Copy of Article (3 pgs.)	35
	5	E-mail, 11-09-01 (1 pg.)	36
17	6	Copy of Web page (2 pgs.)	40
	7	Copy of Web page (2 pgs.)	41
18	8	Copy of Web page (1 pg.)	42
	9	Copy of Flyer (7 pgs.)	42
19	10	Copy of Advertisement (1 pg.)	43
	11	"Rack" card (3 pgs.)	43
20	12	Advertisement (3 pgs.)	43
	13	Letter to Arizona Skydiving Coolidge from Sid Leach, 2-28-2000 (3 pgs.)	45
21	14	Letter to Mike Mullins from Sid Leach, 11-17-2000 (3 pgs.)	46
22	15	Copy of envelope to Arizona Skydiving Coolidge from Pacific Cost Sunglasses (1 pg.)	58
23			
24	16	Financial Statements, 1998-1999 Season (42 pgs.)	59
25			

GRIFFIN and ASSOCIATES

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1

2

EXHIBITS (continued)

3	NO.	DESCRIPTION	MARKED
4	17	Financial Statements, 1999-2000 Season (45 pgs.)	60
5	18	Financial Statements, 2000-2001 Season (40 pgs.)	63
6	19	Financial Statements, 2001-2002 Season (37 pgs.)	63
7	20	P&L Statement, 1998-2002 (2 pgs.)	63
	21	Jump Manifest (4 pgs.)	64
8	22	Web page (1 pg.)	66
	23	1999-2000 Schedule (1 pg.)	66
9	24	12/24 through 2/29 Schedule (1 pg.)	66

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GRIFFIN and ASSOCIATES

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1 THE DEPOSITION OF MIKE MULLINS,
2 a witness herein, was taken upon oral examination by
3 the parties through their respective attorneys before JUDI A.
4 WARMUTH, a Certified Court Reporter in the State of Arizona, at
5 the offices of Snell & Wilmer, Phoenix, Arizona, on the 13th day
6 of March, 2003, commencing at the hour of 8:00 a.m. of said day.

7

8 COUNSEL APPEARING:

9 SNELL & WILMER
10 BY: Sid Leach, Esq.
11 One Arizona Center
12 Phoenix, AZ 85004-2202
13
14 Vernon E. Peltz, Esq.
15 7925 N. Oracle Road
16 Tucson, AZ 85704
17
18
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25

GRIFFIN and ASSOCIATES

5

1 Phoenix, Arizona
2 March 13, 2003
3 8:00 a.m.
4

5 MIKE MULLINS,
6 having been first duly sworn to tell the truth, the whole truth
7 and nothing but the truth, testified as follows:

8

9 EXAMINATION

10 BY MR. LEACH:

11 Q What is your name, please?

12 A Michael Mullins.

13 Q And you're the named defendant in this case, correct?

14 A Yes.

15 Q In about December, 1998, you started Skydiving
16 operations in Coolidge, Arizona, is that correct?

17 A That's right.

18 Q What name did you use to identify the Skydiving
19 operations that you were conducting in Coolidge, Arizona?

20 A Arizona Skydiving Coolidge.

21 Q And did you continue Skydiving operations on weekends
22 at Coolidge, Arizona, through April of 1999?

23 A No.

24 Q When did you stop for the season?

25 A I stopped for the season April, 1999.

 GRIFFIN and ASSOCIATES

6

1 Q Were there any gaps between December, 1998 and April,
2 1999 that you were not doing things at Coolidge?

3 A Well, we operated on every weekend; we also operated
4 during the week.

5 Q Okay. Was that true for the entire period between
6 December, 1998 and April, 1999?

7 A Yes. We operated -- we were scheduled to operate
8 every weekend, and we also operated at certain times during the
9 week, which was scheduled and published.

10 Q So there were some periods of time when you operated
11 during the week and some periods of time that you didn't during
12 that --

13 A That's correct.

14 Q Prior to December, 1998, where had you conducted
15 Skydiving operations during the winter, if anywhere?

16 A I conducted Skydiving operations the previous winter
17 in Keystone Heights, Florida.
18 Q So that would have been the winter of 1997-'98?
19 A Yes.
20 Q What about the previous winter season?
21 A I had operated at various drop zones, some in Florida,
22 some in other places.
23 Q But no place that was yours, is that right?
24 A Well, I had a place, West Tennessee Skydiving, in
25 Memphis, Tennessee. I also operated there.

 GRIFFIN and ASSOCIATES

7

1 Q But not during the winter?
2 A Yes, I operated there during the winter.
3 Q Oh, you did?
4 A Yes, but not every weekend. I operated at other
5 places on some weekends.
6 Q So, do I understand it correctly that, from December,
7 1998 through April, 1999, you operated, or were scheduled to
8 operate in Coolidge, Arizona on weekends and sometimes you also
9 operated during the week?
10 A Yes. Primarily we operated during the week, and the
11 holiday season, basically just prior to Christmas until after
12 New Year.
13 Q And then, after April of 1999, you discontinued
14 skydiving operations at Coolidge, Arizona for some period of
15 time, is that correct?
16 A We were only scheduled to be there during the winter
17 period.
18 Q When did you resume skydiving operations at Coolidge,
19 Arizona?
20 A In December, 1999.
21 Q So, from May, 1999 to November, 1999, you did not
22 conduct any skydiving operations at Coolidge, Arizona, is that
23 correct?
24 A That's correct.
25 Q And when you came back in December, 1999, were you

 GRIFFIN and ASSOCIATES

1 there through April, 2000?

2 A Yes.

3 Q During the December, 1999 through April, 2000 season,
4 were you open on weekends and occasionally, for example,
5 holidays, open during the week?

6 A We were open every weekend and during that period we
7 were also open a period of approximately 60 days, every day,
8 basically all of January and February.

9 Q Did you conduct any skydiving operations at Coolidge,
10 Arizona in May, 2000?

11 A No.

12 Q When did you come back to Coolidge to resume skydiving
13 operations there?

14 A December, 2000.

15 Q And did you conduct skydiving operations at Coolidge,
16 Arizona during the period of December, 2000 through April, 2001?

17 A Yes.

18 Q And did you then discontinue operations and thereafter
19 resume skydiving operations at Coolidge, Arizona in December,
20 2001?

21 A Yes.

22 Q Did you conduct Skydiving operations at Coolidge,
23 Arizona from December, 2001 through April, 2002?

24 A Yes.

25 Q And did you then come back in December, 2002?

GRIFFIN and ASSOCIATES

1 A The business was sold to Marc Hogue May 15th, 2002.

2 Q Okay. And Marc is spelled M-A-R-C, H-O-G-U-E.

3 So, in total, you operated a skydiving center, or
4 drop zone in Coolidge, Arizona under the name Arizona Skydiving
5 Coolidge for four winter seasons beginning in December, 1998 and
6 ending in April, 2002, is that fair?

7 A Yes.

8 Q Prior to May 15, 2002, did Marc Hogue work at Arizona
9 Skydiving?

10 A I don't know anything about Arizona Skydiving.
11 Q Sorry. And I didn't do it intentionally.
12 Did Marc Hogue work at Arizona Skydiving Coolidge
13 prior to May 15, 2002?
14 A That's not a question I can answer yes or no.
15 He had done work there as a tandem master, which
16 he collected fees for, sporadically, over a number of years.
17 I don't remember exactly the times that he did
18 tandems, but he did come out there and jump, and he did do
19 tandems and he was paid for them.
20 Some of the tandems are people that he brought
21 himself, and some of the tandems he probably did for us.
22 Q Was he an employee of Arizona Skydiving Coolidge at
23 any time during that period?
24 A No. Well, I'm not sure how to answer that.
25 I mean, he came out, he took somebody up on a

GRIFFIN and ASSOCIATES

10

1 jump, and he was given 50 bucks or whatever.
2 Q So, as a tandem master, he would have been the
3 skydiving instructor who -- and he would have worn a tandem
4 parachute rig and a student would have been attached to him with
5 a tandem harness and they would have jumped out of the plane
6 together, is that correct?
7 A That's correct.
8 At the time, he was working full-time as a tandem
9 instructor at Skydive Arizona, and he brought these people over
10 here to Arizona Skydiving Coolidge, for whatever reason.
11 I believe that because he wasn't -- I'm not sure
12 why he brought them over there.
13 Q In addition to sometimes bringing tandem students over
14 to Arizona Skydiving Coolidge, would Marc Hogue sometimes come
15 there and work as a tandem master and take students who had
16 otherwise showed up at that drop zone?
17 A I can't ever recall him showing up and actually doing
18 tandem work for us.
19 He may have, but it would have been a very small
20 number.

21 When he came over, he brought tandem students
22 with him. Sometimes they were guys in the military that he
23 knew, and sometimes they were just other people, and he would
24 call us up and say "I've got these tandem students. Can I bring
25 them over to your place and jump them?"

 GRIFFIN and ASSOCIATES

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1 And we said yes. And in those cases we simply
2 charged him for the lift tickets; we didn't take any percentage
3 of his fees.

4 Q Prior to December, 1998, when you opened the Arizona
5 Skydiving Coolidge business, were you familiar with Skydive
6 Arizona?

7 A Yes.

8 Q When did you first become familiar with Skydive
9 Arizona?

10 A I don't recall.

11 Q Was it several years prior to December, 1998?

12 A Probably.

13 Q Would you say that prior to December, 1998 Arizona
14 Skydiving was -- excuse me. Would you say prior to December,
15 1998 that Skydive Arizona was well-known in the skydiving
16 community?

17 A No.

18 Q How did you hear about or become familiar with Skydive
19 Arizona prior to December, 1998?

20 A Well, first off, I've always known it as Eloy, and I
21 believe that most skydivers referred to it as Eloy.

22 Q But could you answer the question.

23 How did you become familiar with Skydive Arizona
24 prior to December, 1998?

25 A I don't really remember how I became familiar with it.

 GRIFFIN and ASSOCIATES

12

1 Q Did you know who Larry Hill was prior to December,
2 1998?

3 A Yes.

4 Q And do you understand that he is the owner and

5 operator of Skydive Arizona?

6 A Yes.

7 Q Were you friends with Larry Hill prior to December,

8 1998?

9 A No.

10 Q Did you dislike Larry Hill prior to December, 1998?

11 A No.

12 Q Did you ever have any conflicts or run-ins or

13 arguments with Larry Hill prior to December, 1998?

14 A I would put it more that he had conflicts with me,

15 rather than I had conflicts with him.

16 Q And could you describe the instances or occasions that

17 you're referring to?

18 A Prior to December, 1998?

19 Q Yes.

20 A At one point prior to December, 1998, he informed the

21 World Freefall Convention, Don Kerland, (phonetic) that if I

22 came to the World Freefall Convention that was held in August,

23 1998, that he, Larry Hill, would not bring his aircraft to the

24 convention.

25 We had subsequent conversations -- Larry and I

GRIFFIN and ASSOCIATES

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1 had a subsequent telephone conversation in which he said that it

2 was safety concerns, and then we made agreements about how we

3 would operate at the World Freefall Convention, and then he said

4 okay.

5 Q Any other instances you can recall prior to 1998,

6 prior to December, 1998?

7 A I can't recall any specific instances.

8 Larry has never been particularly fond of me.

9 Q Would it be fair to say you have never been

10 particularly fond of Larry Hill, either?

11 A I don't think that's fair to say.

12 Q The World Freefall Convention that you referred to in

13 connection with this August, 1998 incident, is that held in

14 Quincy?
15 A Yes, it is.
16 Q In the state of Illinois?
17 A Yes.
18 Q Had you operated your aircraft at the World Freefall
19 Convention in Quincy prior to August, 1998?
20 A Yes.
21 Q During what years?
22 A I've operated there for a total of about ten or 11
23 years, at the World Freefall Convention.
24 Q When was the first year that you operated at the World
25 Freefall Convention in Quincy?

GRIFFIN and ASSOCIATES

14

1 A I don't recall. It was about ten years ago.
2 Q About 1992 or 1993?
3 A Maybe 1991. I really can't recall.
4 Q And whatever year it was that you first operated at
5 the World Freefall Convention in Quincy, Illinois, have you then
6 operated at that convention every year since then?
7 A Yes.
8 Q And the World Freefall Convention is an event held
9 over the course of a couple of weeks every year during --
10 usually during the month of August, is that correct?
11 A No.
12 Q During what month?
13 A The month of August, ten days.
14 Q So the World Freefall Convention is an event held
15 every year, in about August, over the course of about ten days?
16 A It's held from the first Friday in August for ten days
17 each year, in Quincy, Illinois, prior to this last year, the
18 2002 convention, which was held in Rantoul, Illinois.
19 Q The first year that you operated at the World Freefall
20 Convention in Quincy, was Larry Hill also operating aircraft at
21 that convention?
22 A The first year that I was there, I was only there for
23 a few days, and I don't recall if Larry was operating at that
24 convention or not.

25 Q What about the second year that you operated at the

GRIFFIN and ASSOCIATES

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1 World Freefall Convention? Was Larry Hill operating aircraft at
2 that same convention that year?

3 A I believe he was, to the best of my recollection.

4 Q And has Larry Hill generally operated aircraft at the
5 World Freefall Convention every year since then?

6 A Yes.

7 Q At the World Freefall Convention, did you ever
8 purchase, or have someone purchase on your behalf, jump tickets
9 and then resell them at a discount to people who jumped on your
10 aircraft?

11 A Absolutely not.

12 Run that by me one more time.

13 Q The question is, did you ever purchase, or have
14 someone purchase on your behalf, some jump tickets and then you
15 turn around and resell them to people who would jump out of your
16 aircraft at some price less than the price that they would --
17 people would buy them for?

18 A No, no.

19 Q Did you sell your own jump tickets to people who would
20 jump out of your aircraft?

21 A I gave jump tickets to people, friends and whoever I
22 wished to do it.

23 Q Can you give me some idea of the quantity of jump
24 tickets you would give away at a typical World Freefall
25 Convention?

GRIFFIN and ASSOCIATES

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1 A 25, 30. Just simply as a promotion and goodwill. You
2 see a friend and say "here's a jump ticket, go make a jump."

3 Q What would you charge for jumpers to jump out of your
4 aircraft at the World Freefall Convention in Quincy?

5 A The prices were set by management, and they differed
6 from year to year. I don't recall which year you're talking
7 about, but I simply took in the jump tickets that were issued by

8 management and then redeemed them.

9 Q So, whatever you charge, you were -- withdrawn.

10 People would actually buy their jump tickets from
11 manifest, which was run by the World Freefall Convention, and
12 then they would present jump tickets to you that they had so
13 purchased, and you would take them up and they would jump out of
14 your aircraft, is that correct, at the World Freefall
15 Convention, other than the people you gave free tickets to?

16 A That's correct.

17 Q And there was no other circumstance or financial
18 arrangement where people would jump out of your aircraft at the
19 World Freefall Convention other than as we described?

20 A There were organizers at the World Freefall Convention
21 that jumped for free, and they had organizer tickets and we
22 weren't paid for those.

23 Q And does that pretty much sum it up as to how the
24 financial arrangements were handled?

25 A Yes.

GRIFFIN and ASSOCIATES

17

1 Q Did you ever receive some complaints from Larry Hill,
2 or anyone else, that you were operating your aircraft at the
3 World Freefall Convention in a way that they thought was unsafe?

4 A I don't recall the specific instances. Larry was
5 always complaining about something.

6 Q Did Larry Hill ever complain that you were cutting off
7 his aircraft?

8 A I don't recall.

9 Q Did Larry Hill ever complain that you were flying
10 under jumpers with your airplane?

11 A I never heard that one.

12 Q But in any event, you do recall some complaints being
13 made, at least by Larry Hill, relating to safety concerns, is
14 that right?

15 A Well, Larry was always complaining about something.

16 Q And were some of those complaints related to safety
17 concerns he had?

18 A I suppose.

19 MR. PELTZ: Sid, can I take just about a
20 two-minute break here?

21 MR. LEACH: Sure.

22 (Thereupon, a recess was taken.)

23 BY MR. LEACH:

24 Q Were there any other events, boogies, or other
25 skydiving events, where you operated your aircraft at the same

GRIFFIN and ASSOCIATES

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1 event when Larry Hill was operating aircraft prior to December,
2 1998?

3 A I believe there was, but I don't recall the specific
4 event.

5 Q Did Larry Hill ever express any complaints or concerns
6 relating to safety at any of those events?

7 A I don't recall any.

8 Q Were there ever any events where you were operating
9 your aircraft and Larry Hill was also operating aircraft, prior
10 to December, 1998, where you purchased, or had someone purchase
11 jump tickets on your behalf and then resell them at a discount
12 to people who would jump from your aircraft?

13 A Didn't I already answer that?

14 Q We only asked you with respect to Quincy.

15 This question now goes to any other place.

16 A No.

17 MR. PELTZ: He can ask you a question more than
18 once if he wants.

19 A Okay. I just wanted to make sure.

20 MR. LEACH: Off the record.

21 (Thereupon, there was an off-the-record
22 discussion.)

23 Back on the record.

24 Q Did you first meet, or run across Larry Hill at a
25 skydiving event in Albert Lea, Minnesota?

GRIFFIN and ASSOCIATES

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1 A Yes.

2 Q Was that around 1991 or 1992?

3 A Yes.

4 Q At that event, did Larry Hill have two DC3 aircraft

5 that he was flying?

6 A Yes.

7 Q And you showed up at that event as well with an

8 aircraft, right?

9 A Yes.

10 Q And you were operating your aircraft and taking

11 jumpers at that event, correct?

12 A By operating, what do you mean?

13 Q I mean, you were -- people were jumping out of your

14 aircraft?

15 A Yes.

16 Q And at that particular event, in Albert Lea,

17 Minnesota, how did people go about getting jump tickets or

18 paying for jumps?

19 A They went up to the manifest, which was run by Larry

20 Hill and his people, and they bought a ticket, and -- they

21 bought tickets and then, I believe how it was run there, was

22 that when they wished to manifest, they would go to the manifest

23 booth, same place they bought the ticket, they would hand in

24 their ticket and they would be put on a load.

25 Q So, if people wanted to jump out of your aircraft,

 GRIFFIN and ASSOCIATES

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1 would they purchase tickets at manifest and then manifest for

2 your plane in the same manner?

3 A Yes.

4 Q Did you ever sell any jump tickets separately from

5 manifest operation at that event?

6 A Absolutely not.

7 Q Have you ever heard of an event called the Couch

8 Freaks Boogie?

9 A Yes.

10 Q Did you have an encounter with Larry Hill at a Couch

11 Freaks Boogie in Fort Dodge, Iowa in early 1990s?

12 A What do you mean by encounter?
13 Q Were you there and was he there?
14 A Yeah.
15 Q And both of you were operating aircraft for jumpers at
16 that event?
17 A Yes.
18 Q Did you receive any complaints from Larry Hill that
19 you were cutting off his aircraft or otherwise engaging in --
20 A I don't recall any complaints from him at that boogie.
21 Q Did you -- do you recall having a meeting on Friday
22 concerning his concerns about safety in the operation of your
23 aircraft?
24 A I don't recall any such meeting.
25 Q At the events that we've talked about, the World

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1 Freefall Convention, the Couch Freaks, the event at Albert Lea,
2 Minnesota, did you serve as the pilot for your aircraft?
3 A Not always.
4 Q Who else would pilot your aircraft other than you
5 during these events?
6 A I have had several different pilots over the years,
7 and I'm not sure which one flew where at what time.
8 Q But there would be times when you would fly the
9 aircraft and times when you would have someone else fly it?
10 A That's correct.
11 If you want to go back to that Couch Freaks
12 Boogie, and the safety issue that came up, I will tell you about
13 that if you like.
14 Q Sure.
15 A Now that I recall it. And I'm not sure which Couch
16 Freak Boogie it was. It was one of the early ones.
17 When I arrived there, and this didn't have
18 anything to do with Larry Hill, we went up and made some jumps.
19 When I first arrived there and checked in, I
20 wanted to know what frequency the jump planes would be talking
21 on, and they said "oh, we don't have a frequency. You're just
22 supposed to watch out for each other."

23 And I said "well, this is nuts. We have to be
24 talking to each other. You can't do this."
25 They said "no, no, we are just going to do it

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1 this way."
2 So I said okay. And so then we went up and then
3 there was a, you know, conflict between my aircraft and a Twin
4 Otter, and we came down and people were upset, et cetera.
5 And I said, "well, you can't do it this way. We
6 have to talk to each other. You cannot be flying around in the
7 sky with four aircraft over the same point without talking on a
8 common frequency."
9 So, then I made them get a frequency, and then
10 that solved that problem, and that's the only safety issue that
11 I can remember.

12 Q And that was at an early Couch Freaks --

13 A Yes, and I'm not sure exactly which one it was. It
14 was one of the very early ones, because they obviously had not,
15 at that point in time, run a boogie with multiple aircraft, and
16 they were pretty much clueless on how to do it.

17 Q Well, when you had this conversation with them about
18 you need to get a frequency, an agreement was made to do that,
19 was that at some sort of a meeting that people had who were
20 operating aircraft to talk about the issue?

21 A No. I think we just went in the office there, and it
22 was the other pilot and I, and we discussed the situation, and
23 said "well, we're going to have conflicts if we don't talk to
24 each other."

25 And so we got a frequency and then that solved

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1 that problem.

2 Q And was the other pilot, or the Twin Otter in
3 question -- withdrawn.

4 Was the Twin Otter in question that you had the
5 conflict with one of Larry Hill's aircraft?

6 A I don't believe it was. I believe it was another -- I
7 believe it was somebody else.

8 All I remember, it was a kid with long blond
9 hair. That's all I remember about it.

10 Q Your King Air is advertised as one of the fastest, if
11 not the fastest, aircraft to altitude, is that correct?

12 A That's correct.

13 Q Is it fair to say that your King Aircraft that you now
14 fly is a relatively fast aircraft as compared to Twin Otters,
15 and other jump aircraft?

16 A It's not that much faster than a Super Otter. It's
17 only maybe two minutes faster to altitude.

18 Q So your aircraft would be capable of flying to
19 altitude, letting out jumpers and getting back down to the
20 ground and beating a Twin Otter that took off at around the same
21 time, is that right?

22 A Not necessarily. The Twin Otter descends a lot
23 faster, so he usually can make up on descent what he loses on
24 climb.

25 I go up faster; he comes down faster.

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1 Q Is it fair to say that your aircraft would run a cycle
2 going to altitude and then coming back down -- it would take a
3 different amount of time than a Twin Otter or DC3 or some of the
4 other aircraft that might be operating at one of these events?

5 A Yes.

6 Q Was that a potential source of conflict, where you
7 might take off at a timed space depart, but then your aircraft
8 could run a different cycle time and you might come land about
9 the same time?

10 A They all run at different cycle times. The Casas --
11 the Twin Otters make three loads to the Casa's one.

12 Q So, when aircraft run different cycle times, that can
13 be a source of potential conflict in landing?

14 A It shouldn't be.

15 Q It shouldn't be if people observe appropriate safety
16 precautions, correct?

17 A Well, if people are talking to each other, it
18 shouldn't be a problem.

19 Q Did you ever tell people, prior to December, 1998,
20 that you were going to open up a place next to Larry Hill and
21 take his business?

22 A No.

23 Q When did you first start considering the idea of
24 opening a skydiving operation in Coolidge, Arizona?

25 A In Coolidge specifically, in October, November, 1998,

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1 something like that. Maybe even August. Well, I'm not -- I'll
2 go with that.

3 Q Around October, November, 1998?

4 A I'm talking about Coolidge specific.

5 Q You're aware that Larry Hill operated Skydive Arizona
6 from the Coolidge, Arizona facility prior to December, 1998,
7 correct?

8 A He didn't operate Skydive Arizona from Coolidge.

9 Q Why do you say that?

10 A Because that wasn't the name of it when he was in
11 Coolidge.

12 Q What was the name of it?

13 A Wild Horse -- no, it was -- the Skydiving Ranch, or
14 something like that. To the best of my knowledge.

15 I don't believe it was Skydive Arizona when he
16 was in Coolidge. It can be if you want it to be, I don't care.

17 Q I think it was, but I'm just asking for your
18 knowledge.

19 A I don't think it was, but --

20 Q When you opened your skydiving business at Coolidge,
21 Arizona, in December, 1998, you were aware that Larry Hill had
22 operated from that same facility in previous years, correct?

23 A I believe, at that time, he had not operated that
24 facility for the previous eight years.

25 Q Right. But you were aware that he had previously

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1 operated from that facility, right?

2 A Yes.

3 Q When did you first come up with the name that you were
4 going to use for your skydiving operations at Coolidge, Arizona?

5 A It was prior to November of 1998, as we advertised in
6 November, 1998 the name, so it was sometime prior to November,
7 1998.

8 Q And where did you advertise the name in November,
9 1998?

10 A I advertised it in Skydiving magazine, and I
11 advertised it in a flyer that I sent to 4,646 people in November
12 of 1998 from a mailing list from the United States Parachute
13 Association, and that flyer went out to every licensed USPA
14 member in the state of Arizona, and also various other people
15 around the country, and you have copies of that in the documents
16 that I gave you.

17 Q It's true, then, in the United States, every licensed
18 skydiver has to be a member of the United States Parachute
19 Association, correct?

20 MR. PELTZ: Object to form.

21 A What he says.

22 MR. PELTZ: I make the objection. You have to
23 answer, if you can.

24 BY MR. LEACH:

25 Q If there's something that's troubling you about the

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1 question, if you'll explain it, I'll try to fix it.

2 A Well, you could be a licensed skydiver from another
3 country and not belong to the USPA.

4 Q That's why I said in the United States.

5 A Well, you could be a licensed skydiver from another
6 country and you don't have to be a member of the USPA to be a
7 licensed skydiver.

8 If you want to hold a United States Parachute
9 Association license, yes, you must be a member of USPA, but if

10 your membership ceases, you still hold the license.

11 Q Do you recall when you placed the advertisement in
12 Skydiver magazine that you indicate ran in about November, 1998?
13 Do you remember what the lead time was?

14 MR. PELTZ: You have to answer --

15 A I don't recall what the lead time is. It's -- I can't
16 recall what their deadlines are.

17 BY MR. LEACH:

18 Q Had you already signed a lease for the Coolidge,
19 Arizona facility at that time that you placed the ad in Skydiver
20 magazine?

21 A I had signed the lease, yes, prior to placing the ad.
22 You have the lease.

23 MR. LEACH: Let me mark this as Mullins Exhibit
24 1.

25 (Thereupon, Exhibit No. 1 was marked.)

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1 Q Is the document that I've marked as Mullins Deposition
2 Exhibit 1 a copy of the lease that you signed for the Coolidge,
3 Arizona facility?

4 A I think it's out of order, but this is -- yeah, that's
5 the lease.

6 Q But I have marked this in the form in which it was
7 received. Does it appear some pages are out of order?

8 A Let me see it again.

9 Q I would like to try to get it in the right form if I
10 could.

11 A It looks like this page goes someplace else.

12 MR. PELTZ: Put a sticky on it.

13 MR. LEACH: Let's just take it apart and put it
14 back together the right way. This is my only chance to get this
15 right.

16 Mr. Mullins, I don't have any other way to do this.
17 Could you please try to put the lease in the right order so I
18 have something that is representative of the lease.

19 A You know what, I think that was right.

20 I'm looking here and -- I don't know if there's

21 just a page -- no. I know what it is.
22 This -- there was a change to the lease for some
23 work we had done on the property, and this other page was taken
24 out and this one was inserted as the new lease, and that's why
25 there's a one here and not a number here and a two here. But it

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1 is actually correct.
2 Q All right. Now, the date of the lease is November 10,
3 1998?
4 A Okay.
5 Q Is that right?
6 A Um-hum.
7 Q So, was that the -- was November 10, 1998 the date
8 that you signed the lease?
9 A I can't recall. I assume so.
10 Q Who did you negotiate the lease with?
11 A Mr. B-A-U-D-E-K from the City of Coolidge. John
12 Baudek.
13 As a matter of fact, I had sent the City of
14 Coolidge a letter requesting whether there was a spot on the
15 airport for me, and they sent a letter back saying there wasn't.
16 Then, at a later point, they sent me another
17 letter saying "we would like you to bid on a lease for a
18 parachute operation at the City of Coolidge airport."
19 They also sent Larry Hill that same letter and
20 they sent Steve Kelly that same letter.
21 Q And at that time, Larry Hill was operating Skydive
22 Arizona from Eloy?
23 A That's correct.
24 If you want a little history on that.
25 Q Do you know how far apart, in nautical miles,

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1 Coolidge, Arizona is from Eloy, Arizona, where Skydive Arizona
2 is located?
3 A Yes, I do.

4 Q How far?

5 A It's 11 nautical miles. That's as the crow flies;

6 that's not driving miles.

7 Q I understand. They are physically located 11 nautical

8 miles apart, right?

9 A Yes.

10 Q To drive there, because the way the roads go --

11 A It's like 25 miles. And that's why I answered your

12 questions that it wasn't less than 15 miles, because none of my

13 people fly back and forth between them; they all drive.

14 Q Do you have any people that go back and forth

15 between -- or during the time you were running the business, did

16 you have people that went back and forth between Skydive Arizona

17 and Arizona Skydiving Coolidge?

18 A Absolutely. I even drove them back and forth.

19 Q Were they people who were working as tandem master?

20 A No. I'm talking about customers.

21 Q Marc Hogue is one tandem master you indicated that

22 apparently was working at Skydive Arizona and also Arizona

23 Skydiving Coolidge?

24 A I'm not sure. I -- let me -- I don't know that he

25 ever actually made a jump for us.

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1 He brought people out there and we allowed him to

2 collect money from those people and jump and only charged him

3 the lift that a normal customer would pay.

4 I can't say -- he may have done a tandem where we

5 paid him, but I cannot say one way or another if he did or not.

6 Q During the time that you owned the business of Arizona

7 Skydiving Coolidge, and before you sold it to Marc Hogue, did

8 you have a website on the Internet that you used to advertise in

9 connection with that skydiving operation?

10 A Yes.

11 Q Did you have a website on the Internet that you were

12 responsible for maintaining, or that was under your control?

13 A It was under my control.

14 Q Did you have somebody else that was doing it?

15 A Yes.
16 Q Who was doing your web page at that time?
17 A I believe, for most of the time, it was Gain
18 Communications in Tucson, Arizona.
19 Q I'm sorry?
20 A Gain.
21 Q Communications?
22 A Yeah.
23 Q And who was the person or persons at Gain
24 Communications that you dealt with?
25 A Jim Chastain.

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1 Q And did that website have a URL www.Arizona
2 Skydiving.com?
3 A Yes.
4 Q When did you get the domain name Arizona
5 Skydiving.com?
6 A I don't recall the exact date, but it was around
7 November, '98.
8 Q So it was the beginning of your operations at
9 Coolidge?
10 A Yes.
11 Q And the reason why you got the domain name Arizona
12 Skydiving.com was to advertise or promote your skydiving
13 operations in Coolidge, Arizona?
14 A That's correct.
15 (Thereupon, Exhibit Nos. 2, and 3 were marked.)
16 Q I've marked as Mullins Deposition Exhibit 2 a document
17 previously produced in the case with production number SA306.
18 Is this a copy of one of the web pages at your
19 website?
20 A Yes.
21 Q I've marked as Mullins Deposition Exhibit 3 a document
22 previously produced in this case with production numbers SA308
23 through 309.
24 Is this a copy of a web page that, at some time,
25 appeared on your website?

1 A Yes.

2 Q And this was the schedule of your skydiving operations
3 for the season 2000-2001, is that right?

4 A I believe so.

5 Q And during that period of time you owned the business
6 at Coolidge, Arizona, that you were operating under the name of
7 Arizona Skydiving Coolidge?

8 A Yes. But this is -- the web master made an error on
9 this one and it was subsequently corrected as soon as we saw
10 that.

11 I don't know how long this Arizona Skydiving
12 schedule ran there, but that is not my name and I had them
13 correct it.

14 Q But you're referring to a place on the web page where
15 it said Arizona Skydiving Schedule?

16 A Yes. That's not my name, and I had them correct it.

17 Q When did you notice that error?

18 A I don't recall when I noticed the error, but I -- as
19 soon as I saw the error, I told them to correct it, and you
20 know, right underneath it, it says Current Arizona Skydive
21 Coolidge Schedule. I also had them correct the Skydive, because
22 it's skydiving, not Coolidge, but I'm not the one that types
23 this stuff in, and so you look at this stuff and as soon as you
24 see the error, you have it corrected. I never authorized or
25 wanted that to say that.

1 Q Well, this document indicates that the web page was
2 printed out on January 30, 2001, at the lower right, correct?

3 A I don't know what that means, but I'll take your word
4 for it.

5 Q Was the correction made sometime after January 30,
6 2001?

7 A I don't recall. But anything that ever -- any errors

8 like that, I would correct immediately.

9 Q So this one had two mistakes. It said Arizona
10 Skydiving Scheduling, and then below that, there was a heading
11 that said Arizona Skydive Coolidge?

12 A Yes. It was supposed to say skydiving.

13 Q And was the person who made this error, Jim Chastain,
14 at Gain Communications?

15 A I don't know who actually typed it in, but whatever
16 errors -- whenever we saw an error like that, we would correct
17 it immediately. I don't want it to say that.

18 Q And at the time that they created this web page, they
19 had been your -- doing -- creating web pages for Arizona
20 Skydiving Coolidge since December, 1998 or January, 1999,
21 correct?

22 A Actually, no. It was -- I believe the -- I believe
23 the first time that they started this was in the season of
24 December, 2000 because that's when Jim Chastain came to me.

25 I had another Internet company, one out of

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1 Memphis, called Luna Web and they did the website before that,
2 and then Jim Chastain came to me and solicited my business for
3 Gain Communications, and then that's when we started this
4 particular thing.

5 Q Do you know when Jim Chastain first started doing your
6 website?

7 A No, I don't remember. I believe it was in the time
8 frame of December of 2000.

9 Q At the time that Jim Chastain, or Gain Communications
10 started doing your website at www.Arizona Skydiving.com, did you
11 tell him that the name of your business was Arizona Skydiving
12 Coolidge?

13 A Yes. They have it correct on the header. I mean,
14 it's obvious what it's supposed to be.

15 Q Did it occur to you that if people working directly
16 with you in creating advertising literature for you made
17 mistakes like that, that it might be likely that consumers, who
18 had less knowledge and less relationship with you, might make

19 similar mistakes?

20 A My consumers aren't typing things in in my website.

21 This is some employee at a website not paying
22 attention to what they're doing.

23 (Thereupon, Exhibit No. 4 was marked.)

24 Q I've marked as Mullins Deposition Exhibit Number 4 a
25 document that you produced in this case.

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1 Is this a reproduction of an article that
2 appeared in Skydiving magazine entitled A Conversation With Mike
3 Mullins?

4 A Yes.

5 Q And that article sets forth questions asked you by
6 John Hoover and your answers, correct?

7 A Yes.

8 Q And John Hoover is a skydiver, correct?

9 A John Hoover is a skydiver, yes.

10 Q He's with the U. S. Army and a member of the Golden
11 Knights, correct?

12 A That's correct.

13 (Thereupon, Exhibit No. 5 was marked.)

14 Q Let me show you a document that's been marked as
15 Mullins Deposition Exhibit 5, and which has been previously
16 produced in the case and marked with production number SA304.

17 Do you know who Gary or Shannon Poppell,
18 P-O-P-P-E-L-L, are?

19 A Hu-huh.

20 Q Are you familiar with the fact that the domain name
21 for Skydive Arizona is SkydiveAZ.com?

22 A Yes.

23 Q So an e-mail addressed to school at SkydiveAZ.com
24 would be addressed to Arizona Skydiving, correct? I mean --
25 excuse me. So an e-mail addressed to school at SkydiveAZ.com

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1 would be addressed to someone at Skydive Arizona?

2 A I will take your word for it.

3 MR. PELTZ: Do you know or do you not know?

4 A I don't know.

5 BY MR. LEACH:

6 Q This e-mail facility -- excuse me.

7 This e-mail communication of Mullins Deposition

8 Exhibit Number 5 says "I would like information on your Coolidge

9 facility in January. May" -- perhaps that should be my --

10 "cousin, John Hoover, Golden Knights, will be Coolidge training

11 and my wife and I would like to know the possibility of camping

12 there on a Friday night."

13 Do you see that?

14 A Yes.

15 Q And then later, in the PS, there's a reference to the

16 2001 Nationals of being this person's first experience with

17 skydiving, and he goes on to say "I have to say that your Eloy

18 facility is excellent."

19 Do you see that?

20 A Um-hum.

21 Q Do you have any understanding or explanation of why

22 someone who is a cousin of John Hoover of the Golden Knights

23 would think that the Coolidge facility was affiliated or

24 sponsored by Skydive Arizona?

25 MR. PELTZ: Object to form.

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1 MR. LEACH: You still need to answer.

2 A Say it again.

3 Q Do you have any knowledge or explanation of why

4 someone who was a cousin of John Hoover of the Golden Knights

5 would think that the Coolidge facility was sponsored by, or

6 affiliated with Skydive Arizona in Eloy?

7 A It doesn't say that they think it's affiliated or

8 sponsored by.

9 Q Would you agree that this says --

10 MR. PELTZ: Same objection.

11 BY MR. LEACH:

12 Q -- this says -- it appears to think that your Coolidge

13 facility refers to Skydive Arizona?

14 A In this e-mail, the people writing, whoever they are,
15 refer to themselves as whaffos. They don't even spell whaffo
16 right, they are that bad a whaffo.

17 These aren't skydivers, they don't know anything
18 about skydiving, and as I'm sure that you're aware, the Golden
19 Knights train at both Coolidge and Eloy. The Golden Knights
20 train at both Skydive Arizona and Arizona Skydiving Coolidge,
21 and they do it in the same year.

22 The eight-way -- the four-way team trains at
23 Skydive Arizona and at Arizona Skydiving in Coolidge, and in the
24 same year.

25 Q So this person, because he -- withdrawn.

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1 The term "whaffo" is sometimes used in skydiving
2 to refer to general members of the public who do not skydive, is
3 that correct?

4 A That's correct. Whaffo he skydive.

5 Q And wouldn't it be true that general members of the
6 public would do not normally skydive comprise the group who
7 typically do tandem skydives?

8 A Yes.

9 Q So, do you have any information on why the person
10 writing this e-mail would refer to your Coolidge facility in
11 something addressed to Skydive Arizona?

12 MR. PELTZ: Object to form.

13 A As I said before, John Hoover and the Golden Knights
14 jump at both places. I'm sure that if this is a cousin of them,
15 he's probably called them from both places.

16 He's probably called them at both places. I can
17 see whaffos don't know one drop zone from another.

18 Q So, general members of the public, or people referred
19 to as whaffos, might be likely to confuse one drop zone with
20 another?

21 MR. PELTZ: Object to form.

22 A I can't speak for what's in their mind.

23 BY MR. LEACH:

24 Q Based on your experience, have you ever had any
25 experience where general members of the public confused one drop

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1 zone with another?

2 A Not where they are confusing a specific drop zone with
3 another specific drop zone. They are just confused in general.

4 Q And the 2001 Nationals were held at Skydive Arizona in
5 Eloy, correct?

6 A I don't know.

7 (Thereupon, Exhibit No. 6 was marked.)

8 Q I've marked as Mullins Deposition Exhibit 6 a document
9 previously produced with production numbers SA296 and 297.

10 Is this a page that appeared on the website for
11 Arizona Skydiving Coolidge?

12 A Not on my website. I have nothing to do with that
13 whatsoever.

14 Q Could you please explain the difference between your
15 website and whatever website this was on?

16 MR. PELTZ: Object to form.

17 BY MR. LEACH:

18 Q If you know.

19 A This is Marc Hogue's website.

20 This is subsequent to the sale of the drop zone
21 to him in May 15th, 2002. He is responsible for that.

22 I have nothing whatsoever to do with anything,
23 content, form, where this -- the -- it's not even Gain
24 Communications. It's not even my people.

25 I have nothing to do with this. I didn't know

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1 anything about this, and I had never seen it until you showed it
2 to me.

3 Q So, the document of Mullins Deposition Exhibit 6 would
4 have been something that was put on the website after you sold
5 the business, is that right?

6 A Yes.

7 Q Okay.

8 A And as a matter of fact, this is a picture of the

9 porter from Skydive Arizona.

10 Q Yes.

11 A It has nothing whatsoever to do with me.

12 (Thereupon, Exhibit No. 7 was marked.)

13 MR. LEACH: Off the record.

14 (Thereupon, there was an off-the-record

15 discussion.)

16 Q Back on the record.

17 Let me show you a document I've marked as Mullins

18 Deposition Exhibit 7.

19 Is this a copy of a web page from the website

20 after you sold the business?

21 A I don't know.

22 MR. PELTZ: Object to form.

23 A This is not my website. I don't know anything about

24 this document.

25 BY MR. LEACH:

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1 Q The question I want to ask you, do you see the logo,

2 or the art work in the upper left-hand corner --

3 A Um-hum.

4 Q -- with the name and the mountain and so forth?

5 A Yes.

6 Q Was that ever used on the website when it was your

7 website?

8 A No.

9 Q Okay.

10 (Thereupon, Exhibit No. 8 was marked.)

11 Q I've marked as Mullins Deposition Exhibit 8 a page

12 from the website.

13 Did this page appear on the website at the time

14 that you owned the business?

15 A No.

16 Q So this would have presumably been something created

17 after you sold the business to Marc Hogue?
18 MR. PELTZ: Object to form.
19 BY MR. LEACH:
20 Q As far as you know?
21 A I have nothing to do with this piece of paper, or the
22 website that it purports to show.
23 Q Okay.
24 (Thereupon, Exhibit No. 9 was marked.)
25 Now, you recall your testimony earlier where you

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1 were telling about the early flyer that you sent out to the USPA
2 mailing list. I've marked as Mullins Deposition Exhibit 9 -- is
3 this it?
4 A Yeah.
5 Q Okay.
6 A Yes.
7 (Thereupon, Exhibit No. 10 was marked.)
8 Q I've marked as Mullins Deposition Exhibit 10 one of
9 the advertising things that you produced?
10 A Yes, that's mine.
11 Q Could you tell me what publication this ran in? Was
12 it Skydiving magazine?
13 A Yes.
14 (Thereupon, Exhibit Nos. 11 and 12 were marked.)
15 Q I've marked as Mullins Deposition Exhibit 11 a
16 document that you produced, and this is a rack card that was
17 distributed throughout Arizona by someone on your behalf. Is
18 that right?
19 A That's correct.
20 Q Who was the organization that distributed them?
21 A Certified Folder.
22 Q Could you tell me what you know about Certified
23 Folder?
24 Are they an organization that will distribute
25 things? I mean, obviously they will distribute things for you,

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1 but what do you know about where they distribute? What did they
2 tell you?

3 A They distribute to hotels, businesses, pretty much
4 anyplace that people will let them put in a rack for their
5 cards.

6 I think the businesses they have are a minimum
7 number of employees, and they put it in the break room, and then
8 they have it primarily in hotels.

9 Q And do they limit their distribution to the state of
10 Arizona, or do you know?

11 MR. PELTZ: Object to form.

12 A Well, I do know. They distribute them -- they are in
13 more places than the state of Arizona.

14 BY MR. LEACH:

15 Q Did they distribute your flyer or your -- what do you
16 call it?

17 A Rack card.

18 Q Did they distribute your rack card of Mullins
19 Deposition Exhibit 11 to places outside the state of Arizona?

20 A No.

21 Q I've marked as Mullins Deposition Exhibit 12, an
22 advertisement that you produced, and did this ad appear in
23 College Times and also similar ones in New Times and Arizona
24 State Press?

25 A Yes.

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1 (Thereupon, Exhibit No. 13 was marked.)

2 Q Let me show you a copy of a document that I've
3 identified as Mullins Deposition Exhibit 13.

4 Does this document have the correct address for
5 Arizona Skydiving Coolidge?

6 A Yes.

7 Q Did you, or anyone else at Arizona Skydiving Coolidge,
8 refuse to accept certified mail that was attempted to be
9 delivered to you in about this time frame?

10 MR. PELTZ: Object to form.

11 A No. But that's not the mailing address.
12 BY MR. LEACH:
13 Q Oh, that's not the mailing address.
14 What is the mailing address, please?
15 A The mailing -- as we do not get mail -- the mail does
16 not get delivered to Arizona Skydiving. This is for UPS and Fed
17 Ex.
18 The mailing address, it's a P. O. Box in
19 Coolidge, and that's how we get mail.
20 Actually, at this time, it was a P. O. Box in
21 Valley Farms.
22 If you wanted to send us a letter, all you had to
23 do was give us a call and we would have given you the correct
24 mailing address.
25 I'm not even sure that we even advertised this

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1 address.
2 Where did you get this address?
3 MR. PELTZ: He gets to ask the questions.
4 A I'm just trying to clarify.
5 MR. LEACH: Right. It was the best address I
6 could get at the time.
7 A Well, we have an 800 number, and you could have called
8 us and we would have been happy to give you our mailing address.
9 (Thereupon, Exhibit No. 14 was marked.)
10 Q Let me show you a document I've marked as Mullins
11 Deposition Exhibit 14.
12 Does this letter have the -- your correct address
13 where you would normally receive mail?
14 A No. I have no clue where you got that.
15 Q Has that ever been your address?
16 A No. It's -- you got the right town and you got the
17 right zip code, but my P. O. Box is 381104, and that's not even
18 in the neighborhood.
19 Q No, it's not. Okay.
20 After December, 1998, when you opened up your
21 skydiving operations in Coolidge, Arizona, did you ever hear,

22 directly or indirectly, of any complaints from Larry Hill about
23 your skydiving operation?
24 A I heard, indirectly, that he did not like me being
25 there.

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1 Q Were you ever -- withdrawn.
2 Did you ever hear of any information, directly or
3 indirectly, of anyone being confused between the two places?
4 A No.
5 Q During the time that you conducted skydiving
6 operations at Coolidge, Arizona, under the name of Arizona
7 Skydiving Coolidge, were you the pilot of the aircraft that you
8 were using?
9 A At some times.
10 Q So, some of the time you would fly the plane, but at
11 other times you would have someone else fly the plane?
12 A Yes.
13 Q Do you have any rough idea of what percentage of the
14 time you flew the aircraft?
15 A Most of the time.
16 Q And who else would serve as a pilot at Coolidge,
17 Arizona?
18 A My son, Charley Mullins.
19 Q During the period of December, 1998, and through
20 April, 1999, who answered the phone, and in particular the 800
21 number for Arizona Skydiving Coolidge?
22 A I did, various other people did. Anybody that was
23 near the phone answered it.
24 Q But it would typically be someone who was working for
25 Arizona Skydiving Coolidge?

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1 A Usually.
2 Q During the period of December, 1999 through April,
3 2000, who answered the phone for Arizona Skydiving Coolidge?

4 A The same people. I mean, it may not be the same exact
5 people, but the same class of people.
6 Q During December, 2000 through April, 2001, is the
7 answer the same?
8 A Yes.
9 Q And your answer would be the same for December, 2001
10 through April, 2002?
11 A Yes.
12 Q Was the same 800 number answered during the periods
13 that you were not conducting skydiving operations at Coolidge,
14 Arizona?
15 A Yes.
16 Q Who answered the phone during those periods?
17 A Primarily, I did.
18 Q When you were not -- withdrawn.
19 You are employed by Federal Express, correct?
20 A That's correct.
21 Q And you're a pilot for them, is that correct?
22 A That's correct.
23 Q And you've been employed by them for over 20 years or
24 so, is that right?
25 A That's correct.

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1 Q And do you typically fly aircraft at night for them?
2 I don't want to make this hard. I'm assuming
3 that Federal Express does most of their package shuffling during
4 the evenings?
5 A I fly primarily -- primarily between the hours of 10
6 p.m. and 6 a.m., so some of it is daytime and some of it is
7 nighttime.
8 Q And during the periods that you were not conducting
9 skydiving operations in Coolidge, Arizona, between -- you know,
10 during the time period we're talking about, you had a drop zone
11 in Tennessee, is that right?
12 A That's correct.
13 Q When was it typically open? Was it a weekend drop
14 zone or was it open during the week?

15 A It is open sometimes during the week, but it is
16 typically a weekend drop zone.

17 Q And when it was open, you would primarily be the
18 person who would fly the plane there, is that right?

19 A Yes.

20 Q And on other occasions, you would go to skydiving
21 events, like the World Freefall Convention, and operate your
22 aircraft on weekends or during periods of time when there was
23 some event like that taking place?

24 A Yes.

25 Q When would you find time to answer the phone, and

 GRIFFIN and ASSOCIATES

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1 we're talking about the off season, when you were not conducting
2 skydiving operations at Coolidge?

3 A Any time it rang.

4 Q Where would it ring? Would it ring your cell phone?

5 A Ring at my cell phone.

6 Q When you opened the skydiving operation at Coolidge,
7 Arizona in December, 1998, why didn't you name it Coolidge
8 Skydiving Center?

9 A I didn't like that name.

10 Q Why not?

11 A First off, I wanted to be number one in the phone
12 book, so I wanted to start with an A. And I didn't like center.
13 I had West Tennessee Skydiving, so I wanted something along
14 those lines.

15 Q Did you consider using a name that included your name,
16 such as Mullins Skydiving Center?

17 A In the skydiving industry, that's virtually never
18 done.

19 Q Well, in your case, would you say that, as of
20 December, 1998, you were well-known in the skydiving community?

21 A Yes.

22 Q Wouldn't you think that if you used your name in
23 connection with the skydiving center, that it would be something
24 where you might benefit from the fact that you were well-known?

25 A Virtually all skydiving center names in the parachute

1 industry are geographically descriptive. Mullins is not. And
2 Mullins Skydiving Coolidge sounds stupid.

3 Q When you opened the skydiving operations in Coolidge,
4 Arizona, did it occur to you that you would be in direct
5 competition with Skydive Arizona?

6 A No. We offered two completely different services.

7 Q Could you explain that, please.

8 A We -- I, primarily, am a seasonal operation, and my
9 skydivers come from Europe and Japan and from up north where
10 it's cold, and they come because I'm there, and they come
11 because we have cheaper jumps.

12 They wouldn't come if we didn't have the cheap
13 jumps. We can have cheaper jumps because we don't spend a lot
14 of money on our facilities.

15 Q And was your typical price that you charge for
16 experienced jumpers at Coolidge, Arizona on the order of ten
17 dollars a jump?

18 A Yes. It was the same price as I charged at my other
19 drop zone I had in Florida the previous year, ten dollars a
20 jump.

21 Q How did you arrive at a price of ten dollars a jump?

22 A Because it was easy to just take ten dollar bills.

23 Q Did you price the jumps at a level where you could
24 operate the business at a profit?

25 A That was the intent.

1 Q And I understand that you claim that you never made
2 any profit at Coolidge?

3 A In the literature that I sent you, I would have to
4 look at that, but I believe there's two years where I made a
5 profit.

6 Q Do you recall now which years those were?

7 A No. I'd have to look at the documents.

8 Q Okay. When you were determining your profits, for

9 purposes of this case, what did you deduct as expenses?

10 A I have to look at the documents.

11 Q Okay. Did you deduct any salary for yourself?

12 A No

13 Q Did you deduct any depreciation for your aircraft?

14 A No.

15 Q At some point in time, you -- withdrawn.

16 Isn't it true that, at some point in time, you

17 found out that Skydive Arizona was objecting to your use of the

18 name Arizona Skydiving Coolidge on the grounds that it was

19 confusing?

20 A The first time that I was aware that Skydive Arizona

21 was objecting to my name of Arizona Skydiving Coolidge was when

22 a reporter for a patent and trade -- a patent and trademark

23 magazine had called me and said "hey, what about this lawsuit?"

24 And I said "what lawsuit?"

25 And they said, "well, Skydive Arizona is suing

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1 you over your name."

2 And I said "I don't know anything about it." And

3 I said "can you send me the lawsuit?"

4 And he says "well, not really, but here's the

5 attorney, Sid Leach," and so, then I called you and asked you to

6 send me the lawsuit.

7 Q So that was at a point in time when you had not been

8 served with a copy of the complaint, correct?

9 A That's correct, and I told you where to serve the

10 complaint.

11 Q When you called me, did you say, in words or

12 substance, that you refused to change the name?

13 A Yes.

14 Q And why was that?

15 A Because I don't believe it's in conflict.

16 Q And would you have felt that way as of December, 1998

17 when you started the business?

18 A Yes.

19 Q Would you have refused to change the name even if you

20 were to find out, hypothetically speaking, that there was
21 confusion between the two names?

22 MR. PELTZ: Object to form.

23 A If Mr. Hill had come to me in December, 1998, when he
24 was well aware of my name, and said that he objected to it, I
25 might have considered changing it at that time, but not three

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1 years later.

2 I would have done it simply out of a courtesy to
3 him if he felt strongly that it was objectionable, but not after
4 three years of building the name up.

5 BY MR. LEACH:

6 Q So, do you believe that there's -- withdrawn.

7 What do you consider that you did in building the
8 name up?

9 A Years of business, advertising, word of mouth,
10 website. It's the name of my drop zone, it's the name of my
11 company. It's a name I'm fond of.

12 Q So, would you agree that after investing money in
13 advertising and years of operation, and word of mouth, that a
14 name associated with your business would have some value?

15 A Yes.

16 Q Would you agree that that would be true about the name
17 Skydive Arizona?

18 A I'm sure that Skydive Arizona has value to Larry Hill.

19 MR. LEACH: Why don't we take a break at this
20 point.

21 (Thereupon, a recess was taken.)

22 BY MR. LEACH:

23 Q Back on the record.

24 When you set the price of jumps at Arizona
25 Skydiving Coolidge at ten dollars for experienced jumpers, were

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1 you aware that that was less than the amount typically charged

2 at Skydive Arizona at that time?

3 A It was less than the amount charged anywhere in the
4 country.

5 Q Earlier, you gave me an answer about -- that you knew
6 some people were going back and forth and that you even drove
7 some people.

8 Could you explain what you meant by that answer,
9 please?

10 A As most of the skydivers that came to our operation
11 were from either out-of-state or out of country, often they
12 didn't have transportation.

13 We encouraged them to visit all the drop zones in
14 Arizona while they were there, and particularly Skydive Arizona,
15 and we would drive them back and forth, if need be. They'd jump
16 at our operation during the day and we'd drive them over there
17 at night.

18 They'd have dinner, they'd jump over the next
19 day. They'd come back with some other friends. Everybody went
20 back and forth.

21 I'd say virtually 90 percent of the jumpers that
22 jump at Arizona Skydive in Coolidge have also jumped at Skydive
23 Arizona, and vice versa, except for you, I've never seen you
24 there.

25 Q Could you tell me why you would encourage people to

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1 jump at other places, including Skydive Arizona?

2 A Because of a rising tide floats all ships, and as I've
3 said to many people many times, that if there was only one ski
4 operation in Colorado, there wouldn't be very many skiers, and
5 the battle that we have for attracting customers.

6 The other big destination for skydivers in the
7 wintertime is Florida, and there's at least 15 drop zones in
8 Florida. Some within rock-throwing distance of one another,
9 plus they have got Disneyland and a lot of other attractions.

10 When you come to Arizona to skydive, basically
11 that's all you can do, is skydive. And so I wanted to present
12 it, Arizona, as a destination for all people to come and to

13 visit all the drop zones, and I encouraged all our jumpers to go
14 jump wherever they pleased and go take a look at all the other
15 drop zones, and we transported them back and forth and did
16 everything in our power to see that people went to both Skydive
17 Arizona and the other drop zones.

18 As a matter of fact, I sent -- during the entire
19 summer period, when anybody would call me on my 800 number, I
20 sent all the tandem students that called -- I sent them to
21 Skydive Arizona.

22 I gave them the phone number and told them we
23 were not in business during the summer there, and suggested that
24 they go to Skydive Arizona. And I would say that I referred at
25 least two to three hundred people a year to Skydive Arizona.

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1 Even after the lawsuit was filed.

2 Q Do you know, or have you ever heard a of Skydiver
3 named Kim Singer (phonetic)?

4 A She probably has a nickname that I know her by. Do
5 you know the nickname?

6 I don't know.

7 Q Did you ever have someone named Tom Talbot, or
8 something similar to that, who worked at Arizona Skydiving
9 Coolidge?

10 A Tom Talbot worked for Marc Hogue. That was after May
11 15, 2002. I have never had anything to do with Tom Talbot in
12 any form, fashion, or whatever.

13 Q So he worked at Arizona Skydive Coolidge after you
14 sold the business to Marc Hogue?

15 A I don't know what his association was. That was
16 between Marc Hogue and him. You'll have to ask Tom Talbot or
17 Marc Hogue.

18 Q But you're saying whatever he did was after you sold
19 the business?

20 A That's correct.

21 Q Have you ever heard of Pacific Coast Sunglasses in
22 Santa Maria, California?

23 A There are sunglass places that typically call all the

24 drop zones in the country and say, "hey, I want to ship you some
25 sunglasses and, you know, you can sell them, don't send them

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1 back," yak, yak, yak. I know I've gotten some in Tennessee. I
2 don't know if it's this outfit or not. It may be.

3 Q Would they sometimes send catalogues to you?

4 A I've never received a catalogue from any of the
5 people.

6 (Thereupon, Exhibit No. 15 was marked.)

7 Q Let me show you a document that I've marked as Mullins
8 Deposition Exhibit 15.

9 It has production number SA333, but it is one of
10 the documents we are in the process of producing, so, I haven't
11 had a chance to produce it prior to today.

12 Do you know whether you've ever had any dealings
13 with Pacific Coast Sunglasses?

14 A I have never bought, and I never sold any sunglasses,
15 period.

16 Q Would you have any knowledge or information as to why
17 they would address something in the manner in which this thing
18 is addressed?

19 MR. PELTZ: Object to form.

20 A Because there's some clerk typing stuff, and he's got
21 a list of drop zones, he put one drop zone with another address.
22 That's the only thing I can figure out.

23 MR. LEACH: Mr. Peltz, here's an extra copy of
24 that document for you.

25 MR. PELTZ: Thank you.

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1 BY MR. LEACH:

2 Q I need to ask you some questions about the financial
3 documents that you produced, and one of the purposes is to try
4 to have you help me identify the years in which you made a
5 profit and years you didn't, and how you went about calculating
6 it.

7 So let me mark some of the documents that have
8 been produced.

9 (Thereupon, Exhibit No. 16 was marked.)

10 Q I've marked as Mullins Deposition Exhibit 16 a
11 collection of documents that were produced to us marked 1998
12 through 1999 season.

13 A Okay.

14 Q Can you identify those documents for me and explain --

15 A They appear to be what I sent you.

16 Q But what do they purport to be?

17 A Well, this is a profit and loss statement.

18 Q Okay. The first page?

19 A Yes.

20 Q All right. And this is where you've taken the
21 revenues, or total income that you had, and you've totaled up
22 the expenses and it looks like there's a photocopy of a cash
23 register receipt or something --

24 A Adding machine receipt.

25 Q Okay. And then are all of the receipts that were

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1 included in the adding machine receipt -- are copies of them
2 attached?

3 A Yes. The only thing that I don't have a copy of in
4 here is the cash money that I paid the tandem instructors and
5 AFF instructors for the jumps they performed. We paid them in
6 cash at the end of each day.

7 Q So, is that amount -- withdrawn.

8 Where did you account for that, those cash
9 payments?

10 A Under here, cash payments, 1998-1999 season.

11 Q All right.

12 MR. PELTZ: All of those papers together are from
13 1998, 1999?

14 A Yes, unless he's -- yes.

15 BY MR. LEACH:

16 Q So, according to your calculations, you did not make a
17 profit in the 1998 through '99, season?

18 A That's correct.

19 (Thereupon, Exhibit No. 17 was marked.)

20 Q I've marked as Mullins Deposition Exhibit 17 the
21 documents you've produced to us that were marked '99 through
22 2000 season.

23 Does this represent financial information for
24 that season?

25 A Yes, it does.

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1 Q Did you make a profit during that season?

2 A Yes.

3 Q Of \$72,000?

4 A That's correct.

5 Q Let me ask you a question about some of the items that
6 are included in Mullins Deposition Exhibit 16.

7 There are some places where it looks like a
8 receipt for things like Doubletree Inn. Do you see that? Was
9 that included in your calculations?

10 A These are copies of my American Express bills. They
11 were -- the ones that I was claiming on here were highlighted,
12 and they may not have come through, but it's not all of these,
13 and there was a cash register receipt with these -- I mean an
14 adding machine receipt, a different one, that was at the
15 beginning of this. Here it is.

16 So, you can still do it by going by and finding
17 which correspond to this price, but this is the sum of these,
18 but I didn't want to cut out each one of these, or try to block
19 them, so I just sent them all.

20 MR. LEACH: Could you give me a highlighted copy
21 and then I could cut short what I have to ask him?

22 MR. PELTZ: I don't have it with me.

23 MR. LEACH: I know. I don't necessarily need it
24 today.

25 MR. PELTZ: Yeah.

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1 MR. LEACH: If you give me a highlighted copy --

2 A These are all in order and all you have to do is 1350,
3 1350, et cetera.

4 MR. PELTZ: I didn't realize he had highlighted
5 them. I just sent them to the copy place.

6 A I thought the highlighting usually comes through as a
7 blur over it, but it didn't, so maybe I should have put a
8 checkmark by them.

9 MR. LEACH: I don't want to take up your time
10 unnecessarily, so if your counsel could just give me a
11 highlighted copy --

12 MR. PELTZ: Do you think -- can I ask him a
13 question here?

14 MR. LEACH: Sure.

15 MR. PELTZ: Do you think you could go by and put
16 checkmark or something on those? How long do you think it would
17 take you to do that? Maybe we can do it right now, take a short
18 break.

19 A I can do it.

20 MR. PELTZ: How long would it take?

21 A Well, I mean all of them, probably 30 minutes.

22 MR. PELTZ: You want to do it that way?

23 MR. LEACH: Let's go off the record.

24 (Thereupon, there was an off-the-record
25 discussion.)

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1 (Thereupon, Exhibit Nos. 18 and 19 were marked.)

2 Q Back on the record. We had a discussion off the
3 record and came to an agreement that Mr. Peltz would give me a
4 highlighted copy of the financial document so I can tell which
5 expenses were included and which were not, easily.

6 Correct?

7 MR. PELTZ: Correct. That's correct.

8 BY MR. LEACH:

9 Q So, all I need you to do is identify these, then.

10 Mullins Deposition Exhibit 18 are the financial

11 documents for the 2000-2001 season, correct?

12 A That's correct.

13 Q And Mullins Deposition Exhibit 19 -- well, let me ask

14 you about that year.

15 Was that a year that you made a profit?

16 A Yes.

17 Q Then let me show you documents identified as Mullins

18 Deposition Exhibit 19.

19 Are these the financial documents for the 2001

20 through 2002 season?

21 A Yes.

22 Q Okay.

23 (Thereupon, Exhibit No. 20 was marked.)

24 I've marked as Mullins Deposition Exhibit 20 a

25 statement that you produced.

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1 Can you just tell me what that represents? I

2 assume that's --

3 A It's the sum total of the four years. A sum total

4 from the start of operation until the time it was sold to Marc

5 Hogue.

6 Q Okay.

7 (Thereupon, Exhibit No. 21 was marked.)

8 I've marked a document as Mullins Deposition

9 Exhibit 21, and this is an example of quite a few documents that

10 were produced to us.

11 Does this represent a record of the people who

12 jumped from your aircraft at Coolidge, Arizona during a

13 particular period of time?

14 A Yes, it does.

15 Q So, all of the documents like that are records of

16 people who jumped from your aircraft at Coolidge, Arizona?

17 A That is a record of all the jumps made and all the

18 money taken in from those jumps.

19 Q The people who are listed as zero dollars, could you

20 explain who got listed on these things at zero dollars and what

21 that represents?

22 A They were typically either people that were working
23 for me, doing certain tasks like cleaning the bathrooms, et
24 cetera, et cetera, et cetera, or they did work on the building,
25 or they were family members.

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1 Q When a -- say a tandem instructor took a tandem
2 student up, how would you account for that on this kind of
3 document? Would the tandem instructor be listed as zero
4 dollars?

5 A The tandem instructor is listed as zero, and the
6 tandem student is listed as the price he paid for the tandem
7 jump, which varied.

8 Our listed price was 125, but it varied with
9 discounts or friends or whatever.

10 And then the tandem master would get paid by
11 simply, at the end of the day, we would see how many jumps he
12 made, and we would give him the cash.

13 And if you add up all the tandem jumps in this
14 stack, and then compare it to the tandem jumps I paid out,
15 you'll see that they should be the same.

16 I was a little hampered in that the computer
17 system that generates these is in Tennessee. And so I had to go
18 through by hand and pick out all the number of tandem jumps,
19 because I could not run a report.

20 Q Could you give me a range of prices charged for tandem
21 jumps at Arizona Skydiving Coolidge? I take it it would be
22 between \$125 and then something less than that?

23 A It was \$125, and typically, we made deals with groups
24 and we might give it to them for \$115. It was just whatever.
25 It was just, hey, let's make a deal.

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1 Q And how much would you pay the tandem master or the
2 tandem instructor? \$50?

3 A \$50.

4 Q And then, if the tandem student got video of their

5 jump, that would be an extra price?

6 A Yeah. Typically, I believe it was \$75, and then the
7 video guy got -- I think it was \$45. Whatever it says in there.

8 MR. LEACH: Let's take a break. I may be
9 finished but I want to look through my notes real quick.

10 (Thereupon, a recess was taken.)

11 (Thereupon, Exhibit Nos. 22, 23 and 24 were
12 marked.)

13 BY MR. LEACH:

14 Q I've marked as Mullins Deposition Exhibit 22 a
15 document that was printed out from a web page.

16 Was this web page part of the website after you
17 left?

18 A Yeah. I don't know anything about it.

19 Q That wasn't there when you were involved?

20 A That's correct. It's not mine, don't know anything
21 about it.

22 Q Let me show you a document marked as Mullins
23 Deposition Exhibit 23.

24 Was this part of the website when you were
25 running the business of Arizona Skydiving Coolidge?

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1 A I believe so. It appears to be correct.

2 Q Let me show you a document marked as Exhibit --
3 Mullins Deposition Exhibit 24.

4 Was this part of the website during the time that
5 you were running the business at Arizona Skydiving Coolidge?

6 A I believe so. But to tell you the truth I cannot -- I
7 don't recall this being www.Arizona Skydiving.com at the top.
8 I'm not saying it's not, but I recall it being Arizona Skydiving
9 Coolidge at the top.

10 Not that it makes any difference to me one way or
11 the other, but I don't recall this being part of it.

12 Q There's a reference in an article that you just gave
13 me to getting more information about Arizona Skydiving Coolidge
14 by going to a website of www.SkydiveKingAir.com?

15 A That's correct.

16 Q Is that a website that you currently own or maintain?

17 A Yes.

18 Q And do you have information there now referring to
19 Arizona Skydiving Coolidge?

20 A What I have is, I agreed with -- to help Marc,
21 there's -- on my home page there's a link and it says Arizona
22 Skydiving Coolidge and when you click on it, it goes to Marc
23 Hogue's website, just as many businesses have a link to each
24 other.

25 Q You are quoted in an article that you produced to me

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1 as answering the question of why do you charge only ten dollars
2 a jump, and the quotation is actually -- withdrawn.

3 You're quoted in some article here as saying that
4 you offered jumpers a jump ticket for 13 dollars.

5 Did you, at some point, change your prices to 13
6 dollars a jump?

7 A Yes. I've supplied you with a price list and the
8 dates they were ten dollars and the dates they were 13 dollars.

9 Q When did you increase it to 13 dollars?

10 A It's been 13 -- it was 13 dollars for the last two
11 seasons.

12 I don't recall the season before, but I gave you
13 a document with that on it.

14 Q And is that in the financial ones that we marked as
15 exhibits, or is it somewhere else?

16 A It's in something that says price list, that you
17 requested. It's in answer to --

18 Q You're quoted in an article that you produced to me
19 as, when you were asked why you offered jumpers a jump ticket
20 for 13 dollars, saying, "because I can."

21 Is that an accurate quote?

22 A I don't think I ever actually said that.

23 I've said because I can to other things, but I
24 don't think I actually said that to that. Not that I wouldn't
25 mind saying that to that, or see anything wrong with saying

1 that, but I don't think that that's an accurate quote.

2 MR. LEACH: I don't have any further questions at
3 this time.

4 A Okay.

5 MR. LEACH: Thanks a lot, Mr. Mullins.

6 (Thereupon, there was an off-the-record
7 discussion.)

8 MR. LEACH: We've agreed that both Mr. Mullins
9 and the previous witness, Tony Frost, can, if they wish, sign
10 original correction sheets, or signature pages, and provide
11 those to the court reporter without necessarily having to make
12 an appointment with the court reporter and view the original
13 transcript.

14 Is that agreed?

15 MR. PELTZ: That is agreed.

16 (Thereupon the deposition was concluded at 10:34
17 a.m.)

18

19

20

MIKE MULLINS

21

22

23

24

25

1 STATE OF ARIZONA)

2 COUNTY OF MARICOPA) ss.

3

4 BE IT KNOWN that the foregoing deposition was taken
5 before me, JUDI A. WARMUTH, a Certified Court Reporter in the
6 State of Arizona; that the witness before testifying was duly
7 sworn by me to testify to the whole truth; that the questions
8 propounded to the witness and the answers of the witness thereto

9 were taken down by me in shorthand and thereafter reduced to
10 typewriting under my direction; that the signature by the
11 Deponent was not waived; that the foregoing pages are a true and
12 correct transcript of all proceedings had upon the taking of
13 said deposition, all done to the best of my skill and ability.

14 I FURTHER CERTIFY that I am in no way related to any
15 of the parties hereto nor am I in anyway interested in the
16 outcome hereof.

17 DATED at Phoenix, Arizona, this day of March,
18 2003.

19

20

21 -----
22 JUDI A. WARMUTH
23 Certified Court Reporter
24 Certificate No. 50549

23

24

25

 GRIFFIN and ASSOCIATES

Exhibit F

Skydive Arizona, L.L.C.,)
)
 Plaintiff,)
)
 vs.) CIV01-1854-PHX-SMM
)
 Mike Mullins d/b/a Arizona Skydiving)
 Coolidge, and Does I through 10 d/b/a)
 Arizona Skydiving, Coolidge,)
)
 Defendants.)
)

Coolidge, Arizona
April 7, 2003
2:53 p.m.

(Original)

2 WITNESS Page

11

13	No. 1	Diagram Accompanying 18 Pictures, 1 page	44
15	No. 2	Diagram Accompanying 14 Pictures, 1 page	39
16	No. 3	Photograph, 1 page	88

17	No. 4	Photograph, 1 page	89
18	No. 5	Photograph, 1 page	90
19	No. 6	Agreement for the Sale of the	
20		Business Known as Arizona	
21		Skydiving Coolidge, 1 page	19
22	No. 7	Settlement Agreement, Bates	
23		Stamp SA001476 through SA001480,	
24		5 pages	60
25	No. 8	Subpoena, 1 page	131
	No. 9	Fourth Amended Notice of	
		Deposition, 1 page	132

3

1	E X H I B I T S (Cont.)		
2	Deposition		
3	Exhibits:	Description	Marked
4	No. 10	Arizona Skydiving Coolidge	
5		Fun Page, Bates Stamp SA000284,	
6		1 page	132
7	No. 11	Arizona Skydiving Coolidge	
8		Fun Page, Bates Stamp SA000296,	
9		1 page	132
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4

1 DEPOSITION OF MARC HOGUE was taken on
2 April 7, 2003, commencing at 2:53 p.m. at the Coolidge
3 Municipal Airport, 6300 North Airport Road, South Hangar,

4 Coolidge, Arizona, before AMY E. STEWART, a Certified
5 Court Reporter in the State of Arizona.

6

7 COUNSEL APPEARING:

8

9 LAW OFFICE OF VERNON E. PELTZ
By: Vernon E. Peltz, Esq.
10 7925A North Oracle
Tucson, Arizona 85705

11 SNELL & WILMER
By: Sid Leach, Esq.
12 One Arizona Center
Phoenix, Arizona 85004

13

14 ALSO PRESENT:

15 Mr. Mike Mullins

16

17

18

19

20

21

22

23

24

25

5

1 P R O C E E D I N G S

2

3 (Deposition Exhibit Nos. 1 through 7
4 were marked for identification.)

5

6 MARC HOGUE,

7 a witness herein, having been first duly sworn to speak
8 the truth and nothing but the truth, was examined and
9 testified as follows:

10

11 MR. LEACH: Before we start, I wanted to put
12 on the record that I object to the notice of deposition as
13 being insufficient. We got about five hours' notice that
14 we're going to do this today and did not have adequate
15 time to prepare for it.

16

17 EXAMINATION

18 BY MR. PELTZ:

19 Q. Okay. With that being done, do you want me to
20 call you Marc or Mr. Hogue?

21 A. Marc.

22 Q. Okay. Marc, have you ever had your deposition
23 taken before?

24 A. No.
25 Q. Well, there's only a few things that will help us

6

1 get through this easier. Because there is a record, you
2 should answer each question with a yes or a no. Uh-huh
3 and huh-uh are going to look and sound the same on the
4 transcript.

5 A. Okay.

6 Q. And you can't shake your head because she won't
7 see that either. You have to answer each question
8 audibly.

9 A. Okay.

10 Q. You were sworn and are under oath. I am going to
11 ask you a series of questions. Sometimes I don't ask the
12 best question or maybe I don't understand some facts that
13 you know that I don't know and the question is asked.

14 If there is any problem with any of the
15 questions that I ask, please don't hesitate to tell me
16 that you don't understand or you want me to repeat it or
17 ask me what it is -- you know, what you're confused on,
18 but I would think that you wouldn't want to answer a
19 question unless you were sure what the question was.

20 So you will do that for me?

21 A. I will.

22 Q. So if you answer, then I can assume that you
23 understood the question and we're going to move right
24 along.

25 A. Correct.

7

1 Q. Terrific.

2 With that, I think we can just go ahead and
3 get started.

4 A. Can I stop before we get started? I will be
5 right back. I will be right back.

6 Q. Okay.

7 A. Thanks.

8 (Short recess taken.)

9 BY MR. PELTZ:

10 Q. Okay. Now, are we ready?

11 A. All set.
12 Q. Okay. How long have you lived in Arizona?
13 A. I moved here when I was like three and a half.
14 Lived here until I was 17 and then went in the marines and
15 been back and forth ever since.
16 Q. And in the Tucson area? Where did you live when
17 you lived in Arizona?
18 A. Phoenix area.
19 Q. Phoenix area?
20 A. I've never lived in Tucson.
21 Q. Where did you learn to skydive?
22 A. At Coolidge. My first jump was 1986 and then
23 kind of --
24 Q. Right here? Were you right here?
25 A. Actually, it was at the other hangar.

8

1 Q. Okay.
2 A. Made two jumps there and then jumped in the
3 military and jumped kind of all over the country. Fort
4 Bragg; Laurinburg, North Carolina; and Louisiana.
5 Q. When you jumped in '86, who was running the place
6 that you jumped for?
7 A. I don't have a clue. I think that it was Larry,
8 but I know that the first jump was taught by Bob. What is
9 Bob's name? Rigger Bob.
10 Q. It is okay.
11 Mr. Sprague?
12 A. Bob Sprague. He owned Arizona Sky Sports over
13 there in Estrella. He moved to Eloy with Larry and they
14 split their ways and he went to Estrella and then now he
15 is retired and lives in Cottonwood.
16 MR. LEACH: When you say Larry, you mean
17 Larry Hill?
18 THE WITNESS: Correct.
19 BY MR. PELTZ:
20 Q. How many jumps do you have now?
21 A. A little over 8,000.
22 Q. Wow. That's a lot.
23 So then you would consider yourself more --
24 you're not a -- you're more of a pretty average fan of
25 skydiving, fair to say?

1 A. Correct.

2 Q. When did you first begin working for Larry Hill?

3 A. 1995.

4 Q. 1995?

5 A. Correct.

6 Q. What was your position at Larry Hill's?

7 A. Tandem instructor and then I started taking care

8 of the equipment as a rigger and then I became a tandem

9 examiner in '97.

10 Q. Tandem instructor? In other words, you trained

11 people who are going to do tandem jumps?

12 A. Correct.

13 Q. In 1995 do you have any idea how much Larry Hill

14 was charging for a jump, tandem jump?

15 A. 125 bucks.

16 Q. Do you know how much he paid the tandem pilot?

17 A. \$25.

18 Q. Okay. And in 1995 were you aware of any other

19 businesses -- any other skydiving places, other than

20 Larry's?

21 A. Sure. There was Estrella, Buckeye, and Marana.

22 Q. Now, where was Larry operating in 1995?

23 A. In Eloy.

24 Q. And what was the name of his company then?

25 A. Skydive Arizona.

1 Q. In 1995 did he go by any other names?

2 A. Not that I am aware of. The school operated

3 under Adventures in Skydiving, but the drop zone is

4 Skydive Arizona as far as I know.

5 Q. Was there -- were there signs and stuff at his

6 property in 1995 --

7 A. Yes.

8 Q. -- that indicated that name?

9 A. Yes.

10 Q. Have you ever known Larry Hill to go by any other

11 name operating any other skydiving company?

12 A. I know he had a bunch of different names for his

13 airplanes; Pair Drop, Incorporated, and I think there are

14 some other ones for different airplanes. I don't know

15 what they are exactly.

16 Q. How about here in Arizona? Have you ever known

17 him to operate a skydiving operation under any other name

18 other than Skydive Arizona?
19 A. Yes. He was Wild Horse West out in -- when he
20 was up by Lake -- a lake northeast -- northwest of
21 Phoenix.
22 Q. Pleasant?
23 A. Lake Pleasant. And when he was here in
24 Coolidge -- he changed to Skydive Arizona while he was
25 here at Coolidge. He was Coolidge Parachute Center or --

11

1 he was something. He told me about it just the other day,
2 as a matter of fact. We were talking about it.
3 While he was at Coolidge he started out as
4 something and then turned into Skydive Arizona while he
5 was here at Coolidge.
6 Q. Have you ever known him to use the name Arizona
7 Skydiving?
8 A. No. Not to my knowledge, no.
9 Q. Okay. Have you ever known him to use the name
10 Arizona Skydive Coolidge?
11 A. No.
12 Q. Were you still employed with Larry in 1998? Were
13 you still working for Skydive Arizona?
14 A. Yes, I was.
15 Q. Where were you living in 1998?
16 A. Tempe, Arizona.
17 Q. And did you ever receive mail and such at -- or
18 get the mail or pick up the mail at Arizona -- Skydive
19 Arizona?
20 A. Whose mail? My mail?
21 Q. Yeah. Or the business mail.
22 A. Larry's mail?
23 Q. Yeah.
24 A. No. I don't think I ever got his mail.
25 Q. Did you ever have occasion to see it and know --

12

1 you know, know what was in his mail? For example --
2 strike that.
3 Do you know whether or not Larry Hill gets
4 that magazine there, The Parachuters? I see one right

5 there.

6 A. I've seen lots of them on the drops. I would

7 assume that he gets them.

8 Q. Did he receive mail for you at Arizona -- at

9 Skydive Arizona?

10 A. I actually did get my insurance paperwork there.

11 That was it. Everything else I got at home in Tempe.

12 Sometimes somebody would send me something because they

13 don't know my address. They would send it to the drop

14 zone. That's a common thing.

15 Q. What about you? Do you get that magazine, The

16 Parachuters?

17 A. Yes, I do.

18 Q. All right. And do you do any of the flying? Do

19 you fly any of these planes when people jump?

20 A. Yes, I do.

21 Q. Okay. When you fly a plane to do jumps, do you

22 use a radio?

23 A. Yes.

24 Q. Do you use a radio to communicate with your

25 shootest -- shoot people?

13

1 A. No.

2 Q. Just the towerman stuff?

3 A. Correct.

4 Q. Somebody told me that some of the organizations

5 here will be on the same frequency when they're using --

6 when they're skydiving.

7 A. Everybody on this airport is on the same

8 frequency.

9 Q. Well, everybody in this airport and sometimes the

10 people over in Eloy would be on the same frequency when

11 they're skydiving?

12 A. They have different unicom frequency.

13 Q. Oh, they do?

14 A. Absolutely.

15 Q. Okay. So you wouldn't be able to hear what was

16 going on over at Larry Hill's office?

17 A. You would be able to just by rotating. You could

18 do it easy.

19 Q. Okay. They all use the same Albuquerque center

20 though?

21 A. Absolutely.

22 Q. And when you're talking to the Albuquerque

23 center, can you hear other people from other --

24 A. Yes.

25 Q. As a pilot, can you tell some of the people who

14

1 are flying the planes just by the sound of their voice on
2 the radio?

3 A. Absolutely.

4 Q. Can you differentiate Mr. Mullins's voice on the
5 radio from other people?

6 A. Yes.

7 Q. What about Larry Hill's? Could you recognize
8 Larry Hill's even if he didn't give you call signs?

9 A. I can recognize anybody flying in the sky of
10 Arizona with the exception of the new guys.

11 Q. Okay. That takes care of that.

12 Did you sometime in the area of November --
13 around November 1998, did you get a flier in the mail
14 announcing that Arizona Skydiving Coolidge was going to
15 begin operations here at the Coolidge Municipal Airport?

16 A. I have no idea. Maybe. I don't know.

17 Q. Did you know --

18 A. I knew they were operating here, yes, absolutely.
19 I would know that.

20 Q. But you don't remember if you received a flier?

21 A. No. I remember seeing it in the magazine. I
22 remember reading for several years about Steve Kelly
23 fighting to get Coolidge back. I was aware of what was
24 going on over here. I didn't know all the players or all
25 the politics. I just knew that they were trying to jump

15

1 in here and that they succeeded or not.

2 Q. Well, when you started working for Larry Hill in
3 '95, he was operating in Eloy at that time?

4 A. Correct.

5 Q. Do you know whether or not Larry Hill had ever
6 operated out here at Coolidge?

7 A. Yes. I jumped here.

8 Q. That's who you think you might have jumped for --

9 A. Correct.

10 Q. -- but you're not sure?

11 A. Okay. After the fact I think we established that

12 it was Larry that owned it.
13 Q. Okay.
14 A. But at the time I was a student. I came in.
15 There is your instructor. There is your jump master. Go
16 jump.
17 Q. So you don't remember getting a flier, but you
18 knew that Mike Mullins was going to start Arizona
19 Skydiving Coolidge out here sometime around November '98,
20 '99?
21 A. Correct.
22 MR. LEACH: Objection, leading.
23 BY MR. PELTZ:
24 Q. From time to time Mr. Leach will make objections.
25 You can still answer the question if you can. He is

16

1 making that objection to preserve a record at a later
2 time.
3 A. Okay.
4 Q. You can still answer the question.
5 MR. LEACH: It would also help me if you
6 just pause for a second. So if I am going to make an
7 objection, I can state it before you --
8 THE WITNESS: Pause?
9 MR. LEACH: Yeah. Before you give your
10 answer.
11 THE WITNESS: Before I give my answer.
12 Okay.
13 MR. LEACH: Like that last time, I didn't
14 even really get a chance to make the objection between the
15 time he finished his question and the time you gave your
16 answer.
17 THE WITNESS: Okay.
18 BY MR. PELTZ:
19 Q. Okay. So do you know whether or not Larry Hill
20 knew about the beginning of operations for Arizona
21 Skydiving Coolidge out here at this airport?
22 MR. LEACH: Object to the form of the
23 question.
24 MR. PELTZ: You can answer.
25 THE WITNESS: I am not sure before. I

1 assume he did. Everybody knew, so I am sure he did after
2 they were open. I asked about it and he knew about it.

3 BY MR. PELTZ:

4 Q. Okay. Well, when you say after -- I was just
5 getting to get to that.

6 After it was opened, how long after was it
7 opened that you --

8 A. I don't remember. I have no idea.

9 Q. Well, would it have been a whole season, a whole
10 year later, or would it have been closer within the first
11 season?

12 A. There's just been small talk. You know, what is
13 going on? What you think about going over to Coolidge
14 and, you know, that type of thing. I don't remember when
15 it was. I vaguely remember having a couple conversations
16 with him.

17 Q. You had a couple -- I am sorry. I didn't mean to
18 interrupt you. The court reporter doesn't like that
19 either.

20 So you had some casual conversations with
21 Larry Hill and by the tone of the conversation and the
22 subject matter that was discussed, you got the idea that
23 Larry Hill knew that this was a --

24 MR. LEACH: Objection, leading.

25 MR. PELTZ: Yes or no?

1 THE WITNESS: Well, when I -- say that
2 again. You threw me off. That I know he knew -- that I
3 know that he knew that operations were going on here, yes.

4 BY MR. PELTZ:

5 Q. Based upon the conversations --

6 A. Yes.

7 Q. -- the social conversations --

8 A. Yes.

9 Q. -- about skydiving going on here --

10 A. Yes.

11 Q. -- and things of that nature?

12 Yes. Okay. That's fine.

13 Who owns Arizona Skydiving Coolidge now?

14 A. I do.

15 Q. And when did you purchase Arizona Skydiving?

16 A. I believe April 15th, 2002 was the date.

17 Q. He can't answer for you. I am sure Sid would
18 object to that for sure.

19 A. April, May. It might have been May 15th. It was
20 either April 15th or May 15th. I don't remember. We
21 closed the deal late April of last year.
22 Q. April or May is fine. If you -- if you can't say
23 any closer than that, then if I need a better answer, then
24 I will ask. Don't be afraid to have an answer. That's
25 your answer.

19

1 Okay. Let me show you what's been marked
2 for the purpose of this deposition as Exhibit No. 6 and
3 ask you if you can tell me what that is?
4 A. You're asking me this?
5 Q. Yeah. I don't get to ask Sid.
6 A. Well, let me read it. It looks like the
7 agreement that we did when we bought --
8 MR. PELTZ: I think you should have a copy
9 of that, Sid.
10 MR. LEACH: I have never seen it.
11 THE WITNESS: Yeah. That was it.
12 MR. PELTZ: That's it.
13 MR. LEACH: I don't think you produced it.
14 Yeah. We --
15 MR. PELTZ: That's okay. We did. I will
16 get you another copy.
17 BY MR. PELTZ:
18 Q. You guys aren't very wordy.
19 That's on a half sheet of paper there for a
20 whole business sale?
21 A. Correct.
22 Q. You should have the attorneys -- we could turn
23 that into a ten-page document.
24 A. I bet so.
25 Q. Now, does this pretty much fairly encompass the

20

1 whole agreement that you had when you purchased this
2 business?
3 A. That's complete. That's it.
4 Q. Simple, but effective for you? You're happy with
5 it?

6 A. No.

7 Q. Really? Why aren't you happy?

8 A. I want to be on the lease, but that's not his

9 fault.

10 Q. That reminds me. I have a few questions in that

11 regard too.

12 What is the status of the lease?

13 A. Who knows. I had a meeting with the City this

14 morning. They said that as long as Dennis Fitzgibbons,

15 the city attorney, has completed the lease -- which is the

16 same lease. How hard can it be. He gave the excuse that

17 it takes a long time for the city attorney since he only

18 is a part-time city attorney and full-time lawyer. That

19 he puts city stuff off on the back burner. He has put

20 stuff off for weeks and weeks. Months he has been saying

21 it's going to be done. We anticipate being on the board,

22 on the council's agenda for this Monday. I presented

23 three different things for this Monday; for renewal,

24 another related matter, and the transfer.

25 Q. I bet their lease isn't as short as your

21

1 contract?

2 A. No.

3 Q. I bet the lease --

4 A. Not at all.

5 Q. Okay. Well, has Mr. Mullins been aiding you and

6 assisting you as best he can in order to get the lease

7 into your name?

8 A. As far as I know.

9 Q. City of Eloy -- I mean, the City of Coolidge is

10 letting you operate here under the old lease; is that

11 correct?

12 A. Well, there's an arrangement there. I don't know

13 how much I should go into it here on the record, but Mike

14 is still the holder of the lease here. I am his lease

15 manager basically until it is transferred into my name.

16 Q. Okay. Well, since May 15th when you owned

17 Arizona Skydiving, who is it that pays all the -- pays the

18 lease payment to the City of Coolidge, your advertising,

19 your bills, and makes all the day-to-day decisions

20 regarding this business?

21 A. I do.

22 Q. So despite the fact that the lease is actually in

23 Mr. Mullins's name, you pay all the payments and incur all

24 those debts?

25 A. Unfortunately, yes.

1 Q. Now, what about the website
2 www.arizonaskydiving.com? Who owns that after May 15th?
3 A. I do.
4 Q. And do you have complete control over the content
5 of what's on that website? You make all the decisions
6 regarding that website?
7 A. Yes, I do.
8 Q. And did you change the website server from the
9 company that Mike uses, Gain Communications, to a
10 different server?
11 A. Yes, I did.
12 Q. Who is it now?
13 A. Extreme Internet in Scottsdale.
14 Q. And when you first got that site back on
15 May 15th, did you change the content of the website and
16 what it looked like?
17 A. Completely.
18 Q. Did Mr. Mullins have any control or input over
19 what you put on that website?
20 A. Nope.
21 Q. Now, when you first started in this business
22 after May 15th, did there come a time when you needed some
23 aircraft to support the skydiving business here?
24 A. Certainly.
25 Q. And when would that have been?

1 A. From day one.
2 Q. Oh, so you needed aircraft almost from May 15th?
3 A. Correct.
4 Q. Okay. Well, who provided you the airplanes that
5 you used to run the skydiving business on May 15th?
6 A. I leased a Cessna from Tom Talbot and leased a
7 Porter from Larry Hill.
8 Q. From who? Tom --
9 A. Talbot. He owned a drop zone about 40 miles
10 northwest of here. He had recently lost his lease and was
11 looking for a place to operate. I wouldn't allow him to
12 operate here, but I allowed him to bring students here and

13 I would pay him like a finder's fee for bringing the
14 students here and I leased his airplane. I am actually
15 buying that airplane, supposed to be this week.
16 Q. Tom Talbot, do you remember -- did his
17 organization have a name?
18 A. Skydive Phoenix.
19 Q. Skydive Phoenix?
20 A. Yes. Prior to that he was Arizona Air Sports.
21 He bought the place from Bob Sprague, the guy I was
22 talking about earlier.
23 Q. See, I don't know any of these people.
24 A. It is a small community.
25 Q. Amongst the -- amongst the skydivers and the

24

1 people who do skydiving, it does appear to be a very small
2 community.
3 A. Very small. Word gets around. That's why a lot
4 of this magazine stuff -- he said, she said, everybody
5 knows. Everybody knows what is going on. You can't keep
6 a secret to save your life.
7 Q. And amongst the skydiving community, it is sort
8 of like a little small town USA?
9 A. Absolutely.
10 Q. Everybody knows what everybody is doing?
11 A. Yeah.
12 MR. LEACH: I am going to object to the
13 question as leading.
14 THE WITNESS: About half of it will be true,
15 but everybody knows everything.
16 BY MR. PELTZ:
17 Q. Okay. So you used a plane if I am not -- one
18 from Tom Talbot, who is Skydive Phoenix? Right, Skydive
19 Phoenix?
20 A. Correct.
21 Q. How long had he been operating under that name,
22 do you know?
23 A. He ran into some legal problems a couple years
24 and changed it from Arizona Sports to Skydive Phoenix. I
25 don't know exactly when, so I can't tell you how long, but

25

1 it's been around for a while.

2 Q. So Arizona Skydiving Phoenix, maybe two years,
3 maybe three?

4 A. Sounds about right. I think he bought the
5 business from Bob, Bob Sprague, in like '98.

6 Q. '98?

7 A. And then maybe '99 or 2000. Maybe as late as
8 2001 he changed it to Skydive Phoenix.

9 Q. When he bought the business -- well, when he
10 changed the name to Skydive Phoenix in 1998, did you know
11 about it almost immediately upon him doing it?

12 A. I don't know. That's what I just said a minute
13 ago. It is one of those things you heard he did and I
14 don't remember when I heard it. I don't remember when he
15 did it.

16 Q. Did you ever have any conversations with Larry
17 Hill that would indicate to you that Larry Hill knew that
18 he had changed his name to Skydive Phoenix?

19 A. Not that I know of, no. Not that I remember.

20 Q. Between May 15th and, say, January 2003 did Larry
21 Hill of Skydive Arizona provide aircraft for you to use at
22 this business?

23 A. Yes, he did.

24 Q. And what was the name that was on the side of
25 that aircraft?

26

1 A. Skydive Arizona, but although we -- we on the
2 computer for our advertisement altered it so it said
3 Arizona Skydiving Coolidge and we put Coolidge stickers
4 all over it so that we could --

5 Q. You lost me there. Let's go back to that.

6 A. Well, when I shoot a tandem I don't want them to
7 see Skydive Arizona. I want them to see Arizona
8 Skydiving. We altered the -- on all advertisements we
9 altered via computer, so it said Arizona Skydiving
10 Coolidge instead of Skydive Arizona.

11 Q. Is it possible that there could be some shoot or
12 some picture out there that didn't get altered by the
13 computer and it still shows --

14 A. Sure.

15 Q. Okay. Now, if that was true, any planes that
16 said Skydive Arizona on the website or here at the
17 airport, that would have been things that you would have
18 done since you took over on May 15th?

19 MR. LEACH: Object to the form of the

20 question, lacking foundation.
21 THE WITNESS: I didn't understand it
22 anyways.
23 BY MR. PELTZ:
24 Q. Okay. Did you ever know Mike Mullins when he was
25 operating here to use any Skydive Arizona aircraft at

27

1 this --
2 A. No.
3 Q. Okay. So if there are any pictures on a website
4 that show a plane with Skydive Arizona on its wing or
5 anything that would indicate that that plane was being
6 used here, as far as you know, it would have been from
7 May 15th, when you purchased the business, until now that
8 that happened?
9 A. Correct. Or did you just ask me if there could
10 have been any pictures of the Skydive Arizona airplane
11 before May 15th? The answer would be no.
12 Q. Okay. Well, I wasn't -- I was trying to ask it
13 in just in a -- that's a perfectly good answer. I
14 appreciate that.
15 The Arizona craft that has been featured on
16 your website and stuff is the Skydive Arizona's Pilotless
17 Porter?
18 A. Platus.
19 Q. Platus Porter?
20 A. I was just going to say, I don't remember what is
21 on my website. There probably is a picture. There must
22 be pictures --
23 Q. Right.
24 A. -- of that airplane. I am assuming that we
25 changed the name or that it doesn't have Skydive Arizona's

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1 name in the picture. I could be wrong. I don't remember.
2 Q. Right. But Mike Mullins didn't have anything to
3 do with putting that on any of the stuff --
4 A. No.
5 Q. -- if it is on there?
6 A. No. In fact, we tried to make -- we tried to

7 make a clean break with both places. Half of everybody
8 thought that I was Larry Hill's stooge and Larry Hill just
9 owned this place and I didn't.
10 The other half said I was Mike Mullins's
11 stooge and he owned it and that -- so that's why I said
12 about half of it is true. Whatever people couldn't figure
13 out, they just made up the rest.
14 Q. You kind of got the short end of that stick it
15 looks like. I mean, it's your business.
16 A. That's fine. People are going to come jump.
17 I mean, a lot of them come out to jump
18 because they want to know what the real deal is.
19 Q. It was you that would have computer altered the
20 wing of the plane to say Arizona Skydiving Coolidge on
21 the --
22 A. Correct.
23 Q. -- Platus Porter?
24 A. Correct. I got permission from Larry to put the
25 stickers on the airplane and then I got reprimanded for

29

1 putting stickers on the paint. He said, "If you're going
2 to put something on the airplane, put vinyl. Don't put
3 stickers." Then I had to put stickers on the inside of
4 the plane.
5 Q. Okay. Now, did you think it was okay to
6 advertise Arizona Skydiving Coolidge on your -- on Larry
7 Hill's plane?
8 A. Yes. I am leasing the airplane. It is under my
9 operational control.
10 Q. Did you tell him that you were going to put the
11 stuff on even though it was on the paint?
12 A. I asked him.
13 Q. And he said that would be okay?
14 A. Yes.
15 Q. Did you tell them that you --
16 A. Then when he found out it was on the paint, he
17 said, "Just don't put it on the paint. It is going to
18 peel the paint."
19 Q. Did you tell him you were going to computer alter
20 the picture that went on the website to have your name on
21 his plane?
22 A. I don't know if I did or not.
23 Q. Okay. Now, how did you rent the Arizona Skydive
24 plane? Did you pay them monthly or did you -- I mean,
25 Skydive Arizona.

1 A. By the slot.

2 Q. By the slot? What do you mean by that?

3 A. By the seat.

4 Q. By the seat?

5 A. Per seat.

6 Q. Okay. So if you went up one time with two

7 people, you would pay less than if you went up with four

8 people?

9 A. Correct. But there's a minimum on the airplane

10 to make it fly. I believe the minimum was six. I had to

11 have at least six people on the airplane to even fly it at

12 all or a maximum of ten. I think we wanted the average to

13 be seven and a half or something like that. There's

14 certain guidelines.

15 Q. And did you pay Skydive Arizona per jump for the

16 use of that aircraft?

17 A. Per seat, correct.

18 Q. Per seat, per jump?

19 A. Right.

20 Q. Okay. I got it. Per jump, per seat.

21 And did you pay any extra fee for any tandem

22 students that jumped from Skydive Arizona aircraft at the

23 Coolidge Municipal Airport?

24 A. Yes. I paid -- for tandem there was a flat rate.

25 We do the same thing in Rocky Point, and the idea there is

1 that -- well, I don't necessary agree with the idea. It

2 is just to help the airplane out with a little more money.

3 Well, with a Porter it works good because I

4 can put the airplane up with two tandems and it was

5 equitable to fly the airplane. Whereas if I put the

6 airplane up with four slots, it is not equitable. That

7 was generally the idea that the tandems kind of make up

8 for the slots.

9 Q. Okay. I think I understand that.

10 A. We do the same thing at Rocky Point. I don't

11 like it there either.

12 Q. You fly out of Rocky Point?

13 A. We have been doing the same arrangement for eight

14 years down in Rocky Point. I pay \$50 per tandem.
15 Q. To use their airport?
16 A. Correct. Not to use their airplane.
17 Q. To use their airplane?
18 A. No. I lease Larry's Twin Otter in Rocky Point.
19 Q. Was it a different plane that you rented at the
20 Coolidge Airport or was it still a pilot -- Platus Porter?
21 A. It is a different airplane. I leased a Twin
22 Otter in Rocky Point. I have been doing that every year
23 for eight years.
24 Q. Out here at the Coolidge airport?
25 A. No. In Rocky Point, Mexico.

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1 Q. Okay. It was still a Platus Porter, but you
2 would pay a little additional because --
3 A. Right. I do the same thing when I rent the Otter
4 in Rocky Point, Mexico and that's where that came from.
5 Q. How much was the fee per tandem student?
6 A. \$45.
7 Q. Per tandem student?
8 A. Correct. Well, basically the slot -- I can't
9 remember what -- the slot was \$14 apiece, I believe, but
10 for tandem you didn't pay for two slots. You paid \$45
11 flat.
12 Q. Okay. Be fair to say that the \$15 extra per
13 tandem student charge is the result of Skydive Arizona
14 making a commission from the fee of each tandem student
15 that jumps from the Skydive Arizona aircraft at your
16 business?
17 MR. LEACH: Object to the form of the
18 question, leading.
19 MR. PELTZ: You can answer.
20 THE WITNESS: I don't know if I would say it
21 was a commission on the tandem. Everybody makes money on
22 the tandems. They don't make on -- you don't make money
23 off of the fun jumpers. You make money off the tandems.
24 It was Larry's way of kind of making up for the revenue
25 and --

33

1 BY MR. PELTZ:
2 Q. The revenue --
3 A. I don't know if I call it commission.
4 Q. You mean, you think it was Larry Hill's way of
5 making up the revenue.
6 What revenue do you think he was making up?
7 A. Well, if I fly with two tandems, then I am not
8 meeting the minimum.
9 Q. Oh, okay. I see. I got it.
10 Has Skydive Arizona ever supplied you with a
11 King Air?
12 A. No, not that I remember. I think they flew it
13 over here once or twice, but we never jumped it. They
14 were just dropping people off or something. I don't
15 believe we've ever used the King Air.
16 Q. Now, do you ever have an occasion where for some
17 reason, you know, maybe you can't go that day or something
18 is wrong with your plane and you send your students over
19 to Skydive Arizona or people to go over there?
20 A. We did that a couple times where we took people
21 over there because I couldn't get a pilot. We took people
22 over there and jumped them over there.
23 Q. Okay. Did you ever have occasion where Larry
24 Hill for whatever reason would bring people over here and
25 jumped them here instead of at his place?

34

1 A. No.
2 Q. So it is only the one way? You supplied him some
3 business, but he hasn't supplied you with any?
4 A. Well, that was a -- it wasn't his students. I
5 brought my people over there and jumped them with my staff
6 out of his airplane. The only difference was the airplane
7 wasn't over here.
8 It was just the same financial arrangement
9 as when we jumped here. He just allowed me to take them
10 over here rather than -- it didn't make sense for him to
11 fly an airplane over here to drop two people. I just took
12 them over there to jump.
13 Q. Okay. Who paid for the fuel for the aircraft
14 that you were supplied by Skydive Arizona?
15 A. Larry did. I think I paid for a couple loads,
16 but then we finally found out the smartest way to do it
17 was to let him buy the fuel.
18 Q. You pay only a per jump fee and Skydive Arizona
19 operated the aircraft for you including paying the pilot,
20 the fuel, and all the other expenses regarding the

21 operation of the aircraft?
22 A. Correct. That is considered a wet rental.
23 Q. A wet rental?
24 A. Yes.
25 Q. Already to go?

35

1 A. Gas and pilot. The Cessnas are dry. I pay the
2 gas. I pay the oil. I pay the pilot.
3 Q. In your experience, would you say that you
4 paying Skydive Arizona on a per jump basis is a common way
5 that the aircraft are provided to skydiving operations?
6 A. Correct.
7 Q. In your experience, would you say that paying a
8 commission at \$15 per tandem student to the aircraft
9 operator for Skydive Arizona is commonplace in the
10 skydiving business?
11 MR. LEACH: Object to the form of the
12 question, assumes the facts that the witness hasn't agreed
13 to about commission.
14 MR. PELTZ: You can answer, if you know.
15 THE WITNESS: You got me again.
16 BY MR. PELTZ:
17 Q. In your experience would you say --
18 A. That it is not a common thing, no. I don't like
19 it. I understand why it is there. I agreed to it, so I
20 paid it. With the Porter it was very flexible. It
21 allowed me to put the airplane up with less than the
22 minimums. I wouldn't do it with a bigger airplane.
23 Q. Do you have knowledge of any other skydiving
24 operations paying the aircraft operator a commission or a
25 fee on each tandem student?

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1 MR. LEACH: Object to the form of the
2 question.
3 THE WITNESS: I do in Rocky Point.
4 BY MR. PELTZ:
5 Q. That's you. I meant anybody else.
6 A. I've heard of it before, but I don't -- I am
7 not -- I know it happens, but I can't say a time and place

8 right now.

9 Q. Do you have any idea of the total amount that you
10 paid Skydive Arizona for the use of their aircraft at your
11 business here at this airport, say, your first season?

12 A. Well, just shy of \$90,000.

13 Q. That's from May 15th until now?

14 A. Correct.

15 Q. Okay. Do you have any idea the total amount that
16 you've paid Skydive Arizona in the \$15 fee for the tandem
17 students?

18 A. No, no idea. That \$90,000 included -- now that I
19 am thinking about it, it is between \$90,000 and \$100,000
20 because I also leased an Otter from Larry to do a TV show
21 down in Mexico in August. That included that, and that
22 was \$18,000 for that.

23 The grand total between using the Porter and
24 the Otter for last season was between 90- and \$100,000. I
25 don't know how much of that was the additional tandem. I

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1 am sure it wasn't very much of that. Because
2 unfortunately we didn't do a whole bunch of tandems. We
3 did a reasonable amount.

4 Q. Okay. So you kind of separate the world of
5 skydivers into the tandem jumps where you make some profit
6 and the fun jumpers and those are the guys that are pretty
7 much avid parachuters? Yes?

8 MR. LEACH: Object to the form of the
9 question, leading.

10 THE WITNESS: I don't know if I do it.
11 That's just -- economics do it.

12 BY MR. PELTZ:

13 Q. Okay. What I am trying to talk about is the type
14 of skydivers that there are that you've known and you've
15 experienced in your business.

16 You have the tandem people that come out and
17 hook up with somebody and go down in tandem?

18 A. Uh-huh.

19 Q. And then the fun jumpers. I am trying to get an
20 idea in your mind.

21 Who is a fun jumper? Somebody that has one
22 or two jumps or somebody that has 300 to 500?

23 A. I think what you're looking for is -- actually,
24 what we call them is experienced jumpers or student
25 jumpers. That's kind of where you're leading.

1 Experienced jumpers come out, they pay for
2 the slot, they have their own equipment, they go jump.
3 You make 1, 2 -- \$3 off of their slot. You're not going
4 to make a living off of experienced jumpers. Especially
5 if you don't own an airplane.

6 Student jumpers -- I've been in instruction
7 for 15 years. That's kind of my forte. I like teaching
8 students to skydive. I like taking students for tandem
9 skydives, and that's where the money is too.

10 Q. In all the planes that were provided for your
11 business out here, were they marked with the name Skydive
12 Arizona?

13 A. No.

14 Q. Which one wasn't?

15 A. The Grand Caravan, Mike's King Air, the Cessna
16 206, the Turbo Cessna 206, and the 182.

17 Q. How many planes were marked with the name?

18 A. One.

19 Q. The Platus --

20 A. Porter.

21 Q. -- Porter?

22 A. And we flew the Otter out here one time.

23 Q. And it was marked or not marked?

24 A. It was marked Skydive Arizona.

25 Q. Okay. And would you say that it is clearly

1 marked with Skydiving -- can you at least see it? It
2 shows up quite readily?

3 A. Yes.

4 Q. Okay. I got some exhibits here. I want to talk
5 to you for a minute about some signs that I saw on the way
6 in here.

7 A. Yes. I forgot about them. I am going to get in
8 trouble for those.

9 Q. What makes you say that?

10 A. Because I am supposed to change it from Arizona
11 Skydive Coolidge to Skydive Coolidge, and I didn't do that
12 yet. Larry actually just told me about it last week.

13 Q. Well, here's a diagram that's been marked as
14 Exhibit 2 for the purpose of this deposition. I've been

15 told it sort of fairly and accurately represents a diagram
16 of the road that we drove on to get out here today and the
17 airport at Coolidge.
18 MR. LEACH: Object to the form of the
19 question.
20 BY MR. PELTZ:
21 Q. What do you think?
22 A. That's the only way in and the only way out.
23 Q. Okay. So it would be fair to say that this
24 fairly depicts -- it is not to scale or anything, but it
25 sort of depicts the layout of how you get off the highway

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1 to your hangar?
2 MR. LEACH: Finished? Object to the form of
3 the question.
4 THE WITNESS: From Coolidge, yeah. That's
5 how you get there.
6 BY MR. PELTZ:
7 Q. Okay. This one right here represents --
8 A. Right.
9 Q. -- Kenilworth Road? Here's the airport road
10 where you turn off?
11 A. Basically what you have here, a diagram of the
12 airport.
13 Q. Okay. Now, I've also prepared this diagram so it
14 has got numbers on it at various spots along that route.
15 Okay. I have prepared for example a picture that will go
16 with this Exhibit No. 2 and the picture has a number 1 on
17 it.
18 Can you tell me if that picture number 1 --
19 A. Correct.
20 Q. -- represents the sign that you would see as you
21 would come to --
22 A. Correct.
23 Q. -- this first turn off?
24 A. Yes, I do.
25 Q. So for this picture that is Exhibit 2, number 1,

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1 and you say that shows the sign that is currently right

2 out there on that place on the map?

3 A. Correct.

4 Q. Okay. This is another picture?

5 A. Same thing. Same picture.

6 Q. Same picture, but a little closer. This is 2, 1

7 also for the purpose. Same picture, but closer.

8 Finally, I have a number 1 marked number 1

9 on the back that goes with this, so we will call it 2, 1

10 also.

11 A. Same sign.

12 Q. Same sign, but closer.

13 Okay. Now, as you go down the map I see a

14 number 2 right here. I am going to show you what is

15 marked as 2, 2 and ask you if that fairly and adequately

16 depicts the sign that is there at that juncture?

17 A. Yes.

18 Q. Here is another one, 2, 2. Same sign, a little

19 closer it looks to me.

20 A. Yes.

21 Q. Now, this one is marked 2, 3 and it corresponds

22 with this.

23 Do you believe that's a true and correct

24 copy of the sign that shows up at the number 3 location on

25 this map?

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1 A. Yes.

2 Q. This one is marked 2, 4 for the purpose of this

3 deposition.

4 Does it fairly and adequately depict the

5 sign that is at the number 4 position on this map?

6 A. Yes.

7 Q. This is another 2, 4. It looks like a little

8 closer of the same sign.

9 A. Yes.

10 Q. And this one has been marked 2, 5.

11 Does that look like the sign that appears at

12 the place marked number 5 on Exhibit 2?

13 A. Yes.

14 Q. And this looks like number 5, only closer, 2, 5?

15 A. Yes.

16 Q. And this is marked number 2, 6.

17 Does it look like the sign that appears at

18 position number 5 on Exhibit 2?

19 A. I don't know where that is. That's on the side

20 of the hangar.

21 Q. Well, it looks like the 6 probably could have

22 been a little closer your -- I believe that's what the 6
23 is?
24 A. I think that's on the front of the building.
25 Q. Okay. You believe this is on the building

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1 somewhere?
2 A. Oh, okay. It is on the other side. Yeah. I
3 know where it is at.
4 Q. Okay.
5 A. Yeah. That's on the north side of the building.
6 Q. So this represents the sign that's on the north
7 side of the building?
8 A. Yes.
9 Q. It corresponds with Exhibit 2.
10 And 6 looks like another shot a little
11 further away?
12 A. Yes.
13 Q. Here's 2, 6 and 7.
14 It shows like the front of your building and
15 the sign?
16 A. Yes.
17 Q. And number 7 shows, it looks like, a banner next
18 to the building?
19 A. Yes.
20 Q. Is that still there?
21 A. I believe so.
22 Q. And this next 2, 7 is another picture of the same
23 banner only different places. It looks like two --
24 A. Right.
25 Q. They're all the same.

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1 And these are two more 7s that goes with
2 Exhibit 2 showing the front of the building?
3 A. Correct.
4 Q. They all fairly and adequately depict the way
5 this is right now?
6 A. Correct.
7 Q. Has it been that way ever since you owned this
8 company?

9 A. Yes, I think.
10 Q. Now, while I am on the maps and the pictures
11 since we're already in the mode, let go through these. I
12 am going to show you what's been marked as Exhibit No. 1.
13 Can you tell me what that looks like to you?
14 A. It is Eloy.
15 Q. Eloy? The city of Eloy?
16 A. No. It is the drop zone.
17 Q. That's the drop zone out at the airport in Eloy?
18 A. Correct.
19 Q. Okay. Now, I've done the same thing on
20 Exhibit 1. I have a series of pictures that represents
21 signs starting -- it looks like this is the highway that
22 goes out to the road. Those numbers, I am going to show
23 you the same pictures. This one is 1, 1.
24 Does that fairly and accurately depict
25 number 1 on --

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1 A. As far as I know. I have never seen that sign
2 before.
3 Q. You can't say for sure then?
4 A. No.
5 Q. So we would do the same thing for all of number
6 1? It looks like that's just a bigger version?
7 A. Looks like a new sign. I mean, that's --
8 Q. Well, this is actually number 2?
9 A. That sign I recognized.
10 Q. Okay.
11 A. There was one that looked a lot similar to that.
12 Q. This one has been marked as number 3.
13 A. Correct.
14 Q. Does it fairly look like the sign that's placed
15 where number 3 is on Exhibit No. 1?
16 A. Yes, it does.
17 Q. And this looks like a bigger version of the same
18 sign marked 3?
19 A. Yes.
20 Q. So this would be 1, 3.
21 And this is a sign -- or it looks like a
22 banner over the top of a gateway --
23 A. Yes.
24 Q. -- that shows up as number 4 on Exhibit 1?
25 A. Correct.

1 Q. And this has been marked as number 1, 5.
2 Is this the sign that shows up at 5 marked
3 on Exhibit 1?
4 A. Correct.
5 Q. And this looks like it's marked where the sign
6 that appears on number 6 on Exhibit 1, so it would be 1,
7 6?
8 A. Correct.
9 Q. Fairly and accurately depict the sign that you
10 believe to be there?
11 A. Correct.
12 Q. Thanks.
13 This one, do you recognize this as a sign
14 that appears where the 7 is marked on Exhibit 1?
15 A. Yes.
16 Q. And does it fairly and accurately depict the
17 sign?
18 A. Yes.
19 Q. This is number 8 marked on Exhibit 1.
20 Where the 8 is, does it look like the --
21 A. Yes.
22 Q. -- sign that appears at number 8?
23 Thank you.
24 MR. MULLINS: Do you mind if I open this
25 door? It is getting hot.

1 THE WITNESS: Sure.
2 BY MR. PELTZ:
3 Q. Another number 8 for 1, 8?
4 A. Yes.
5 Q. And this one is marked as 1, 9?
6 A. Yes.
7 Q. Looks like the same sign?
8 A. Yes.
9 Q. Fairly and accurately --
10 A. Yes.
11 Q. And this one --
12 A. Yes.
13 Q. -- 1, 10.
14 This one looks like it is a plane?
15 A. Yeah. Twin Otter.

16 Q. That's a Twin Otter?
17 A. Correct.
18 Q. Okay. And I guess that's why it is out here in
19 the middle of a field somewhere on 11, and here's number
20 12.
21 A. That's one of Burner's balloons.
22 Q. Do you see the name Skydive Arizona appears on
23 his trailer? Do you see that?
24 A. No. I never saw that before.
25 Q. Do you see it on the picture?

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1 A. I do, but I've seen that trailer a million times
2 and never noticed that that's on there.
3 Q. Do you know how long that's been on there?
4 MR. LEACH: Object to the form of the
5 question, lack of foundation.
6 THE WITNESS: No idea.
7 BY MR. PELTZ:
8 Q. Okay. Do you know whether or not there's any
9 connection or business relationship between Larry King and
10 this High But Dry Balloons, Burner you call him?
11 A. I don't think Larry King knows who Larry Hill is.
12 Q. Excuse me.
13 Do you know if there's any relationship, any
14 business relationship, between Larry Hill and this
15 Mr. Burner guy?
16 A. I don't know what the business relationship is,
17 but Burner flies balloons and jumps jumpers at the Eloy
18 drop zone.
19 Q. Do you know whether he ever drops Arizona Skydive
20 students out of his balloon?
21 A. He doesn't drop my students, no.
22 Q. Do you know whether he drops Skydive Arizona
23 students out of there?
24 A. Not students. Experienced jumpers, yes.
25 Q. He drops experienced jumpers?

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1 A. Yes. I jumped out of a balloon in Eloy before.
2 Q. Any of your experienced jumpers jumped out of

3 that balloon?

4 A. Sure.

5 Q. What is the difference between a balloon and a

6 plane?

7 A. No air speed. Jump out of an airplane and you're

8 going 90 miles. Jump out of a balloon, it is a dead stop.

9 It is like a base jump.

10 Q. That makes a big difference in the jump?

11 A. It scares the crap out of people.

12 Q. Really? So it's easier to jump out of something

13 going 90 miles than --

14 A. You have immediate control because there's wind

15 out there.

16 Q. You learn something new every day. Okay. That's

17 enough for the maps there.

18 Now, you rely on those signs that say

19 Arizona Skydiving Coolidge in order to show people how to

20 get here so that they can jump at your place? Yes or no?

21 MR. LEACH: Object to the form of the

22 question.

23 THE WITNESS: I would say no. Because the

24 signage for this place is horrible and we've been fighting

25 with the City to try to get an airport sign in the town of

50

1 Coolidge so that more people can find the airport.

2 Those signs are there when they get into

3 the -- by the time they find the airport -- I mean, yeah,

4 those signs are nice. It tells them of the south hangar,

5 but they're there at that point.

6 MR. PELTZ: Right.

7 THE WITNESS: It was on the signs you showed

8 me earlier. The hard part is getting people to the

9 Coolidge Airport or to the town of Coolidge for that

10 matter.

11 BY MR. PELTZ:

12 Q. Now, how long have those signs that we looked at

13 in Exhibit No. 1 -- 2, right here, the Arizona Skydive

14 Center, how long have those signs been in place, do you

15 know?

16 A. I have no idea. Quite a few years.

17 Q. Were they in place before you bought this

18 business?

19 A. Yes, they were.

20 Q. When your business used the Skydive Arizona

21 plane, where did the pilot park the aircraft?

22 A. Right out front on the tarmac.

23 Q. And where do you pick up the customers to go
24 jump?
25 A. Right out front on the tarmac.

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1 Q. Be correct to say that any of your skydiving
2 customers could read the letters Arizona Skydiving
3 Coolidge on the front of the building when they were
4 getting in and off of that plane?
5 MR. LEACH: Object to the form of the
6 question.
7 THE WITNESS: Yes.
8 BY MR. PELTZ:
9 Q. Be fair to say that that sign would be fairly
10 obvious to anybody standing in the area right at the front
11 of the shop out here where they get on the plane?
12 MR. LEACH: Object to the form of the
13 question, leading.
14 THE WITNESS: I don't know if it is obvious,
15 but it is there.
16 BY MR. PELTZ:
17 Q. All your jumpers, students, or otherwise arrange
18 for their skydives at your manifest counter out here?
19 A. Correct.
20 Q. They come and pay for their jumps and arrange for
21 their skydiving right underneath the banner on top of the
22 manifest that says Arizona Skydiving Coolidge?
23 MR. LEACH: Object to the form of the
24 question, leading.
25 THE WITNESS: It says Skydive Coolidge, but

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1 yes.
2 BY MR. PELTZ:
3 Q. Skydive Coolidge.
4 But until recently didn't that banner that's
5 above the manifest say Arizona Skydiving Coolidge?
6 A. Correct.
7 MR. LEACH: Object to the form of the
8 question.
9 THE WITNESS: Sorry.

10 BY MR. PELTZ:
11 Q. That's okay. When did that change to Skydiving
12 Coolidge?
13 A. January 1st.
14 Q. Okay. And you said that you had stickers inside
15 the aircraft to show Arizona Skydiving Coolidge?
16 A. Correct.
17 Q. I asked you this one before, but are you sure
18 that you've never known Larry Hill to advertise as Arizona
19 Skydiving?
20 A. Correct. I've never heard him advertising that.
21 Q. Even during all the time that you worked for him?
22 A. Arizona Skydiving? Never.
23 Q. Have you ever known Skydive -- oh, no. Never
24 mind. That's the same question.
25 Has there been a time between May 15th and

53

1 2003 when Larry Hill from Skydive Arizona has been present
2 out here at the Coolidge Airport?
3 A. Yes.
4 Q. How many times has he been out here?
5 A. Three, four, five. I don't know. Not very many.
6 Q. And when he was here, was he in and about the
7 area like where the signs are out in front? I mean --
8 A. Yes.
9 Q. And those signs are all present when he was here?
10 A. Yes.
11 Q. They haven't changed any of those?
12 A. No. The only signs that we took down is the one
13 that said specifically Mike Mullins Arizona Skydiving
14 Coolidge.
15 Q. The one that said Mike Mullins?
16 A. Correct.
17 Q. When did you take those down?
18 A. May, June. I don't know.
19 Q. Almost immediately after --
20 A. Correct. Correct.
21 Q. Was that your idea or was it someone else's idea?
22 A. It was my idea.
23 Q. All right. Who else has been out here from
24 Skydive Arizona?
25 A. What do you mean? Like --

1 Q. Has any other member of the staff of Skydiving
2 Arizona been to your business out here?

3 A. When you say staff, you're implying like
4 employees?

5 Q. People connected.

6 A. If you're talking about instructors, who are
7 independent contractors, I've had lots of them out here.
8 I would hire and call people over there and say, "Hey, you
9 want to do a couple jumps for me?" They would come.
10 They're independent contractors. They work all over the
11 country.

12 Q. Okay. Has Larry Hill's son, Shawn Hill, been out
13 here?

14 A. He must have. It seems like he was. I am not
15 sure.

16 Q. What about Zing?

17 A. Actually, Zing was not an employee of Larry's.
18 Zing was an employee of mine and he was flying Larry's
19 airplane, but then he turned into Larry's employee.

20 Q. Okay. So he was an employee of you, who was
21 flying for Larry, and then he just switched over?

22 A. Well, he was flying Larry's -- he was flying for
23 me and when we started using the Porter, he flew for Larry
24 as well. He flew both my Cessna and Larry's Porter for
25 me. Then over the winter when Mike came, we didn't have a

1 place for him anymore and so now he is flying for Larry
2 full time over there. If I had had an airplane to employ
3 Zing over here, he would be over here. He likes Coolidge.
4 He lives right here. He really likes this place. He
5 wants to be here.

6 Q. Is that his real name?

7 A. No. Bob Engstrom is his real name. They say the
8 reason he got the name Zing is because that's what you
9 heard when he went by you because he is a real good
10 skydiver, real fast, real famous.

11 Q. Have you ever had a time between May 15th and
12 2003 where Arizona Skydiving -- where customers from
13 Arizona Skydiving Coolidge board the Skydive Arizona
14 aircraft at the Coolidge Municipal Airport and then jump
15 over and land on Skydive Arizona's property?

16 A. Customers? You mean, like tandem students or --

17 Q. Yeah. Customers, jumpers, students.
18 A. We had experienced jumpers do that, but never
19 student jumpers.
20 Q. Experienced?
21 A. Correct.
22 Q. Why would they do that?
23 A. To go to the bar and restaurant over there.
24 Q. You don't have a bar and restaurant over here?
25 A. No.

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1 Q. All right. Now, after you purchased the business
2 from Arizona Skydiving on May 15th, did you let Larry Hill
3 know that you had purchased the business?
4 A. Yes, I did.
5 Q. How soon after you purchased it did you let him
6 know?
7 A. Prior to.
8 Q. Did you ask him about, you know, how he felt
9 about you purchasing that business?
10 A. Yes, I did.
11 Q. What did he tell you?
12 A. He said absolutely. Get it.
13 Q. Did you have any discussions with Larry Hill
14 regarding you using the name Arizona Skydiving Coolidge?
15 A. Not prior to. Afterwards we did.
16 Q. Okay. What did he say about that?
17 A. He said he really didn't care.
18 Q. Did he tell you that he didn't care what you
19 called it as long as Mike Mullins wasn't involved with
20 your business or words to that effect?
21 MR. LEACH: Objection, leading.
22 THE WITNESS: No. Sorry.
23 BY MR. PELTZ:
24 Q. No?
25 A. No, he did not.

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1 Q. Did he tell you that he didn't care what you
2 called it?
3 A. Yes.

4 Q. So you had absolutely no preference if you called
5 it Arizona Skydive Coolidge or any other name?
6 MR. LEACH: Objection, leading.
7 THE WITNESS: No. He didn't care. That's
8 what he conveyed to me.
9 BY MR. PELTZ:
10 Q. Okay. Well, when you purchased the business from
11 Mike Mullins, did you take out advertising and do things
12 like that for the name Arizona Skydiving Coolidge?
13 A. Lots of it.
14 Q. By cards, rack cards, and things like that?
15 A. Rack cards, phone books. About eight different
16 phone books and about five different newspapers.
17 Q. Place advertising in the Coolidge Times?
18 A. No.
19 Q. Did you place advertising in the New Times?
20 A. Yes.
21 Q. College Times, oh.
22 Did you place advertising in the College
23 Times?
24 A. Yes.
25 Q. And your yellow page ad that you purchased, did

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1 it say Arizona Skydiving Coolidge?
2 A. Yes, it does.
3 Q. And you said you bought rack cards?
4 A. Correct.
5 Q. Are you still using those materials today?
6 A. Yes, I am.
7 Q. Did Mr. Hill ever tell you that he wanted you to
8 stop using the name Arizona Skydiving Coolidge?
9 A. Yes, he did.
10 Q. When was that?
11 A. August maybe.
12 Q. August of --
13 A. I don't remember. 2002.
14 Q. You purchased it in May?
15 A. Correct.
16 Q. May of --
17 A. 2002.
18 Q. 2002.
19 So maybe sometime after the summer was up,
20 around August or in that area?
21 MR. LEACH: Object to the form of the
22 question, leading.
23 BY MR. PELTZ:

24 Q. So between three and four months after?

25 MR. LEACH: Objection, leading.

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1 THE WITNESS: I think.

2 BY MR. PELTZ:

3 Q. Okay. And did he tell you why he wanted you to
4 change the name of your business? I mean, you told me
5 previously that he said you could call it whatever you
6 wanted.

7 Did he tell you why he wanted you to change
8 it in August or September, whenever it was?

9 MR. LEACH: Object to the form of the
10 question, leading.

11 THE WITNESS: He said it had something to do
12 with the lawsuit. It presented a quandary with the
13 lawsuit.

14 BY MR. PELTZ:

15 Q. Well, what did you -- you mean, he thought it put
16 his lawsuit in jeopardy? Is that what he was trying to
17 tell you?

18 A. Pretty much.

19 Q. Well, did you tell him that it was going to kind
20 of -- what did you tell him about all the cards and
21 advertising that you printed up?

22 A. I was not very happy with it. I told him I had
23 paid all this money and tried to establish, you know, the
24 name out there. He said, "Well, you know, you can use
25 what is out there. Just change it as of this date

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1 basically." I think that was about it.

2 Q. I am going to show you what's been marked as
3 Exhibit No. 7 and ask you if you can recognize that.

4 A. It looks like the agreement that we -- that Larry
5 and I signed changing the name, but this doesn't look like
6 the one that I signed.

7 Q. Well, I want you to look at it real carefully and
8 tell me if that is the one you signed or not?

9 A. It's got my signature. There's no question it is
10 a copy of my signature.

11 Q. I understand that.
12 A. It is definitely my signature, but the one that I
13 signed I specifically gave back and said, "I don't own
14 Arizona Skydiving. I own Arizona Skydiving Coolidge."
15 He went through in his computer in his
16 office and changed everywhere where it said Arizona
17 Skydiving to Arizona Skydiving Coolidge. At the same time
18 he had him go in and change -- he spelled my name with a
19 K. You can see how many times my name is in here. I
20 said, "Well, since you're in there, change it to C as
21 well."
22 Q. Okay. Hold on a minute. Now, you said something
23 I didn't understand it here. You said that the -- this
24 looks like, if I understand your testimony, something that
25 has some of terms of your agreement, but you said there

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1 was typos? In other words, where it says Arizona
2 Skydiving instead of Arizona Skydiving Coolidge --
3 MR. LEACH: Object to the form.
4 BY MR. PELTZ:
5 Q. -- in this agreement --
6 MR. LEACH: Object to the form of the
7 question, leading.
8 BY MR. PELTZ:
9 Q. -- in the original one that you looked at, right?
10 A. Correct.
11 Q. And in the original one, it also misspelled your
12 name with a K, M-a-r-k, the common way to spell Mark?
13 A. Correct.
14 Q. When I look at this agreement, it looks like it
15 still has --
16 A. It says Arizona Skydiving instead of Arizona
17 Skydiving Coolidge.
18 Q. It says Arizona Skydiving Coolidge and it has the
19 Mark fixed?
20 A. Correct.
21 Q. But now if I understood your testimony, you told
22 him when you go back and change Arizona Skydiving
23 Coolidge, change the Mark too?
24 A. Correct.
25 Q. Now, was the very next agreement that you saw

1 correct in those respects or did you see one draft that
 2 looks like this with the Mark changed, but not Arizona
 3 Skydiving?
 4 A. I never saw one in that form. The next one that
 5 I saw had Arizona Skydiving Coolidge everywhere and it had
 6 my name spelled correctly and that's the one I signed.
 7 Q. So the difference between this one here and -- do
 8 you have any idea what these numbers are down here on the
 9 corner of that document?
 10 A. No, I don't.
 11 Q. See, it says SA001476.
 12 A. I don't. My guess is it is Skydive Arizona and a
 13 document number.
 14 Q. And then 77. They're sequential numbers, it
 15 looks like. 78, 79.
 16 Those weren't on the original contract that
 17 you signed?
 18 A. I couldn't say that with certainty. I don't
 19 know. I don't remember ever seeing them, but --
 20 Q. Okay. So you know that when you looked at
 21 whatever agreement that you agreed on with Larry Hill --
 22 A. Uh-huh.
 23 Q. -- you said, "Hey, fix Arizona Skydive to change
 24 it to Arizona Skydiving Coolidge. That's the company I
 25 own"?

1 A. Correct.
 2 Q. "And fix my name," right?
 3 A. Correct.
 4 Q. Now, what name did you change to?
 5 A. Skydive Coolidge and that document says
 6 skydiving -- no. It says Coolidge Skydiving, which I
 7 didn't -- that wasn't my name.
 8 Q. What I am trying to understand is, was that
 9 Coolidge Skydiving in the first agreement --
 10 A. No.
 11 Q. -- that you signed changed?
 12 A. No. I never seen that name. I never agreed to
 13 that name. I never agreed it was going to be anything
 14 close to that name.
 15 Q. So not only did this agreement not look like the
 16 first one you saw, it doesn't look like the second one you
 17 saw either?

18 MR. LEACH: Object to the question. It is
19 leading, and also, I got to say, I object to you pointing
20 out those numbers on the lower right-hand corner and
21 suggesting to the witness that that has anything to do
22 with the document he signed because you know good and well
23 that those numbers --
24 MR. PELTZ: Before you take up all my time
25 with --

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1 MR. LEACH: Those numbers are production
2 numbers that were added to every single document that got
3 produced to you --
4 MR. PELTZ: I understand.
5 MR. LEACH: -- to identify the document that
6 were provided.
7 MR. PELTZ: I understand that, Sid.
8 MR. LEACH: If you ask him are those numbers
9 on the document that you signed, suggests to him that --
10 implies a reference that the document was changed.
11 THE WITNESS: I am going to the restroom. I
12 will be right back.
13 MR. PELTZ: We're going to take a break. It
14 is not improper.
15 (The witness leave conference room at this
16 time.)
17 MR. PELTZ: I simply asked him if they were
18 on his agreement when he signed it. I know they weren't.
19 I didn't suggest anything. If I am not mistaken, the
20 proper objections here are form. Why don't you make it
21 and then be done. We'll go off the record until we're
22 back from the break.
23 (The deposition was at recess from 3:57 p.m.
24 to 4:02 p.m.)
25 THE WITNESS: For the record, that document

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1 as far as -- I don't know what the numbers are. I don't
2 remember seeing them, whatever, but when Mike brought that
3 document, he called me and told me that you had already
4 been given the document. I said no problem. Mike brought

5 me the document. He said, "What is your new name?" I
6 said, "Skydive Coolidge." He said, "Well, why does it
7 say 'Coolidge Skydiving'?" I said, "I have no idea. I
8 wasn't that stupid. I didn't sign a document with the
9 incorrect number on it, was I?"
10 Then I looked through the document again. I
11 said, "Wow, wow, wow." I think that I might have
12 accidentally signed something with my name wrong, but when I
13 saw it said, "Arizona Skydiving," I knew that wasn't the
14 document that I signed because I specifically --
15 MR. LEACH: But your initials are on the
16 first --
17 THE WITNESS: My initials are on it and my
18 signature is on this. I do not deny that. Those are a
19 copy of my signature and a copy of my initials, but I did
20 not sign the document that said Arizona Skydiving.
21 MR. PELTZ: Well, everyone is trying to --
22 MR. LEACH: Let me tell you what --
23 THE WITNESS: That comes from me is what I
24 am saying. That happened to come from me.
25 MR. LEACH: This is what I got. That was

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1 supposed to be the agreement.
2 Do you have a copy of what you did sign?
3 THE WITNESS: I do --
4 MR. LEACH: Why don't you get it because --
5 THE WITNESS: -- in San Diego.
6 MR. LEACH: Okay.
7 THE WITNESS: Yeah.
8 MR. LEACH: Obviously, we want to get the
9 right document.
10 THE WITNESS: Right.
11 MR. LEACH: No one is intentionally
12 providing the wrong document here.
13 MR. PELTZ: We don't know what anyone else
14 is doing.
15 THE WITNESS: I saw it. That didn't come
16 from anybody else. Mike brought it to me and said, "Are
17 you Skydiving Coolidge?" I was like, "No way." I didn't
18 make that mistake, did I? Maybe I did. I started to
19 doubt myself and I looked at the document. I am like,
20 "How did I miss that?"
21 Then as soon as I saw Arizona Skydiving,
22 then I said, "Absolutely not," because that was the two
23 things. The name -- my first name, I really didn't care
24 about. When I saw everywhere that it said, "Arizona

25 Skydiving," I threw it back to Larry. I said, "No. I am

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1 not Arizona Skydiving. I am Arizona Skydiving Coolidge.
2 Change it and I will sign it." This is the only one I
3 have ever seen.

4 BY MR. PELTZ:

5 Q. This wouldn't be the first time we have seen
6 Larry try to make our names be Arizona Skydiving by
7 printing it that way, so it is not shocking to me.

8 MR. LEACH: I am going to object to the way
9 that you're conducting this deposition. That comment was
10 totally uncalled for.

11 BY MR. PELTZ:

12 Q. Now, have you had any conversations with
13 Mr. Leach here about changing your name?

14 A. Yes, I have.

15 Q. Mr. Leach asked you to change your name also?

16 MR. LEACH: Object to the form of the
17 question, leading.

18 THE WITNESS: Yes. I wouldn't say -- it
19 wasn't a threat. It wasn't a -- it was just a statement
20 of fact that in order for me to stay out of the litigation
21 between you two, I had to change the name. If I didn't
22 change the name, then I would be included in the lawsuit.
23 I didn't want to be included in the lawsuit. I am friends
24 with Mike. I am friends with Larry, both for quite a few
25 years. I wanted to remain that way.

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1 Since the onset of this thing, I tried to
2 stay out of that little fight, but still be friends with
3 both of them, still conduct business with both of them.
4 That's where we came up with the agreement.

5 BY MR. PELTZ:

6 Q. But you did rely on Larry Hill's permission
7 before you printed all the advertising that you had made?

8 MR. LEACH: Object to the form of the
9 question, leading.

10 BY MR. PELTZ:

11 Q. Didn't you?

12 MR. LEACH: Objection, same objection.
13 THE WITNESS: I don't know what you mean. I
14 mean --
15 BY MR. PELTZ:
16 Q. I mean, you didn't start printing any advertising
17 until Larry said it was okay? Yes or no?
18 MR. LEACH: Objection to the form of the
19 question, leading.
20 THE WITNESS: I don't remember, but I wasn't
21 worried about it. I wasn't worried about the lawsuit for
22 two reasons. Number one, Mike said that -- when he signed
23 that document that all the litigation was his. He said in
24 the document it says that all liability he takes, so the
25 lawsuit was his. I didn't worry about it. On top of

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1 that, Larry said that he didn't care.
2 BY MR. PELTZ:
3 Q. That's what I mean.
4 A. I never really was worried about the name.
5 Q. That's what I mean. You basically -- you went
6 and asked Larry if it was okay before you printed the
7 advertising? Yes or no?
8 A. I think so. I don't remember the exact date.
9 That would be reasonable to say. I did not go to Larry
10 and say, "Is it okay if I keep this name and then go
11 advertise," but somewhere in there. I started advertising
12 immediately and I started advertising the name. Then
13 somewhere in there we came up with the conversation and he
14 is like, "Well, I don't care."
15 Q. Did you buy more advertising after he told you
16 that?
17 A. Absolutely. Absolutely.
18 Q. Okay. At some point in time did Larry Hill
19 threaten to stop letting you use his aircraft unless you
20 changed your name?
21 A. No. No, I don't think so.
22 Q. Okay.
23 A. Maybe he did. He didn't threaten. That's not
24 the right way to put it. I think he said he wouldn't be
25 able to maybe.

1 Q. Well, meaning that "if you didn't change your
2 name, I won't be able to find the aircraft to send down
3 there"?

4 A. No. No. Not in this way. It wasn't in a -- it
5 wasn't a threat. Let's put it that way.

6 Q. You got the idea that the aircraft were going to
7 be contingent upon changing the name? Yes or no?

8 A. Not necessarily.

9 MR. LEACH: Objection -- well --

10 THE WITNESS: No.

11 BY MR. PELTZ:

12 Q. And after Larry asked you to change your name,
13 did he still send aircraft to your business?

14 A. Yes.

15 Q. And was this during the time that the Arizona
16 Skydiving Coolidge banner was over your manifest?

17 A. Yes.

18 Q. And when was the name change made to Skydive --

19 A. January 1st, I believe. January 4th or whatever.
20 I think we made it as of the first of the year.

21 Q. We've covered Exhibit No. 7 already. That's
22 not --

23 A. 1st, yeah. I think it was the 1st.

24 Q. Right. Now, I want to ask you some of the terms
25 in here since this isn't the exact agreement.

1 The name is Coolidge Skydiving and your name
2 was Skydiving Coolidge, I believe, correct?

3 A. I don't know. What does it say?

4 Q. Well, this says Coolidge Skydiving.

5 A. Skydive Coolidge.

6 Q. Skydive Coolidge.

7 Okay. In the agreement that you did have,
8 did you also have an agreement that you could continue to
9 use any existing advertising that had been printed for
10 Arizona Skydiving Coolidge until it ran out as this
11 paragraph 6 seems to indicate?

12 A. Correct.

13 Q. And did you also agree that, you know, you would
14 change your yellow page ads on the next cycle when they
15 came out?

16 A. Correct.

17 Q. And did you also reach an agreement sort of
18 concerning the use of ww.arizonaskydiving.com, that you

19 would continue to use it in that name, this agreement
20 says, as long as you had at least 34 percent ownership and
21 as long as you were making all the decisions running the
22 business?
23 A. Correct.
24 Q. So the website Arizonaskydiving.com --
25 A. Uh-huh.

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1 Q. -- is going to remain that way and doesn't have
2 to be changed in any foreseeable future as long as you are
3 the one running this business?
4 MR. LEACH: Objection.
5 THE WITNESS: Correct.
6 MR. LEACH: Object to the form of the
7 question.
8 THE WITNESS: That was the sticking point of
9 this. I wasn't going to give up the name. The domain
10 name is different than a trade name, let's say. It is a
11 domain name and I wasn't -- everybody knows how -- how do
12 I put this? That's where people know where to find us on
13 the Internet. If I change that, they're not going find us
14 on the Internet. It is not Skydivearizona.com. It's
15 Arizonaskydiving.com. I wasn't going to give that up.
16 That was a sticking point in that agreement, and we came
17 with that compromise.
18 BY MR. PELTZ:
19 Q. And it shows up here on this on page 3. I have
20 to refer to the pages because it looks like paragraph 8,
21 page 2 and 3, is where those terms are on this agreement.
22 But what I am trying to say is that the
23 substance of your agreement with Larry Hill was that you
24 would continue with that name as long as you had
25 35 percent equity and you maintained complete control of

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1 the business?
2 A. That sounds correct.
3 Q. Okay. And that's all I had about the agreement.
4 That one will be done too.
5 Now, did Mike Mullins operate his aircraft

6 for you between December 2002 to the present time?

7 A. Yes, he did.

8 Q. You envision he will continue to operate his

9 aircraft for you until next season, say, for example?

10 A. If we can come up with a more equitable

11 agreement, yes.

12 Q. Okay. What is your current agreement?

13 A. What do you mean?

14 Q. With Mike Mullins. You said, "If we can come up

15 with a more equitable agreement."

16 What is the agreement that you had?

17 A. I need to charge more for the slots. I need to

18 get more money basically.

19 Q. Well, what -- I am trying to ask you to lay out

20 for me what the agreement you had with Mike Mullins was.

21 A. During the season I paid \$12 a slot. We charged

22 13. During the now period I pay \$13 and I charge 15.

23 Q. Okay. So for Mike Mullin's past season on the

24 slots, he was charging you 12?

25 A. Correct.

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1 Q. Was Larry Hill still flying planes out here for

2 slots?

3 A. No.

4 Q. When Mike Mullins came out here, Larry Hill took

5 his plane back?

6 A. Correct.

7 Q. What does Mike -- I mean, what does Larry Hill

8 charge per slot?

9 A. 14 a slot, and I charge 17.

10 Q. And so then can I guess that the agreement you

11 wanted to work out with Mike Mullins for the next season

12 is going to be something more similar to what Larry Hill's

13 is?

14 A. No.

15 Q. Okay. What do you think would be more equitable?

16 A. For me to get all the money and not him.

17 Q. Okay.

18 A. Well, that's the idea. He wants all the money.

19 I want all the money. You compromise and you come up with

20 something in between.

21 Q. Okay. Has Larry ever talked to you about how

22 much you should charge for a jump out here at this

23 business when you took over?

24 A. He did talk about the tandems. I am not going to

25 lie. I asked him what he thought about me buying this

1 place because he's a friend of mine. Mike was a friend of
 2 mine too. I didn't want to split ties with either one of
 3 them.

4 He said, "Yes. As long as you're not
 5 undercutting us on the tandems on the prices, I don't see
 6 why not." And I brought it to him as it could be a
 7 win-win for him too. As I stated at the city meeting -- I
 8 thought I said that earlier, in the city meeting, "We're a
 9 different market than his. He is a big business world,
 10 champion teams." This is -- and what ended up happening
 11 is when we started flying here, we immediately took all
 12 the small jumper business: Estrella, Buckeye, and even
 13 Marana.

14 All those people that wouldn't jump there
 15 anyways came here. I will say and I said it many times,
 16 Skydiving Arizona is the best drop zone in the world.
 17 There's no question about it. It is a big business. It
 18 is a great drop zone. If you're a student jumper with 10
 19 jumps, 50 jumps, whatever, it is not the best place for
 20 you. Too much going on, too big airplanes. People like
 21 to have more one-on-one service.

22 As an instructor there, I always strived to
 23 do that over there, to give them more service. But
 24 there's only so much time. You're turning, turning,
 25 turning. That's why the instructors all wanted to work

1 there because they do so many jumps in a day. Well, I
 2 always said I would like to see you do less jumps but get
 3 paid more for the jumps and have more face-to-face time
 4 with the customer and provide a better service. So
 5 smaller in this respect is better. It is different.

6 Q. Gee, it seems like you seem to think that you and
 7 Arizona Skydive don't even really -- excuse me.

8 You seem to think that you and Skydiving
 9 Arizona don't really compete at all?

10 MR. LEACH: Object to the form of the
 11 question as leading. Also should note for the record that
 12 you called my client Arizona Skydiving.

13 THE WITNESS: No. I think we could
14 complement each other. That's is what I said to Larry.
15 BY MR. PELTZ:
16 Q. Okay. Well, I am sort of getting the idea that
17 you think that if -- I mean, there's almost like two
18 different kinds of clientele.
19 MR. LEACH: Object to the form of the
20 question.
21 THE WITNESS: We do.
22 BY MR. PELTZ:
23 Q. Do you think that the experienced jumpers that
24 are out there are confused between you -- between the
25 Arizona Skydiving Coolidge name and Skydiving Arizona?

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1 A. The experienced jumpers?
2 Q. Yeah.
3 A. Not a chance in hell.
4 Q. Not even a remote chance?
5 A. No.
6 Q. Okay. What about the instructors and stuff?
7 A. No.
8 Q. What about the students, the newbies?
9 A. Yes, absolutely.
10 Q. Do you think there's anything you could do to
11 minimize that confusion?
12 A. Try.
13 Q. I mean, if you change your name to Zebra Jumping,
14 do you think they would still be confused?
15 A. To a degree. Not as much obviously, but one of
16 the things that we tried to stress in the advertising is
17 Coolidge. Coolidge, Coolidge, Coolidge. Not Eloy,
18 Coolidge. Some people are just that dumb. They can't get
19 it in their head. Yeah, we're Arizona Skydiving Coolidge
20 located at the Coolidge Municipal Airport at the town of
21 Coolidge southeast of Phoenix and they still go to Eloy.
22 Q. They still go to Eloy?
23 A. Because that's the bigger drop zone. That's the
24 one they hear of more. I mean, that's like going -- you
25 know, go get me a Coke. I don't want a Coke. I wanted a

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1 Sam's Special Cola, but Coke is just a -- it is the name
2 that's known out there.
3 Q. Has anybody -- do you think anybody has ever
4 shown up here when they were supposed to be out at Eloy?
5 I mean, that they had mistaken you for Eloy?
6 A. Since I owned the business, never.
7 Q. Not even once?
8 A. Not one time.
9 Q. So if there is confusion, it works to Skydive
10 Arizona's advantage?
11 MR. LEACH: Objection, leading.
12 THE WITNESS: It always benefits them.
13 Every time it has benefited them, and Larry and I have had
14 conversation after conversation about it. Larry agreed
15 and told people, "Hey, if you've got Marc's students, send
16 them back over to Coolidge." However, Larry has some
17 minions over there that work for him that will knowingly
18 take my students on a skydive, knowing that they have a
19 deposit over here, knowing that me and my wife and
20 two-year-old daughter drove all the way down here to take
21 these people on a skydive, and take them over there. I've
22 had a few conversations about it.
23 BY MR. PELTZ:
24 Q. Well, then what happens with the deposits they
25 left over here?

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1 A. We give them back. Rightfully, I should keep it.
2 I am not going to do that. It is not their fault. I
3 mean, yeah, they're not too bright, but it is not their
4 fault that somebody over there knowingly took them
5 knowing -- I mean, I threatened a couple times to Al and a
6 couple of those guys. I am going to keep the deposit, but
7 they don't care. They don't care about the students, so I
8 didn't. I've never done it. Not once have I taken a
9 deposit from anybody that went over there.
10 It makes you -- it really makes you mad when
11 you drive down here in the middle of freaking summer with
12 your daughter and your wife and get a pilot here and get
13 another instructor here and they go to the wrong place and
14 then they take them knowingly.
15 Q. And that would be more than five or six people at
16 a time? I guess you're going to book five or six before
17 you're going to go up?
18 MR. LEACH: Object to the form of the
19 question.

20 THE WITNESS: No.
21 BY MR. PELTZ:
22 Q. It could just be for two?
23 A. One or two. That's when it really makes you mad.
24 The only reason we drove down here was to take care of
25 that customer, and they went to the wrong place and they

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1 ended up jumping over there.
2 Q. What were you charging for jumps on Mike
3 Mullins's aircraft on November 30th through December 20th?
4 A. \$15.
5 Q. From December 21st through March 2nd?
6 A. \$13.
7 Q. And from March 3rd to the present?
8 A. \$15.
9 Q. Now, did Larry Hill ever ask you to charge a
10 certain amount for your regular jumps at this business?
11 A. No.
12 Q. He didn't ask you to go higher or lower than 13
13 or 15 on those slots?
14 A. Yes, he did. He actually -- actually, originally
15 it was 13 the whole year and as to try to make things --
16 Larry said that his biggest problem with this place was
17 that it undercuts him so bad. So in an effort to try to
18 make things a little better, I told Mike I wanted to
19 charge 15 during the periods and Mike compromised and
20 charged 15.
21 Q. Why can't Larry Hill charge 13?
22 MR. LEACH: Object to the form of the
23 question.
24 MR. PELTZ: You can answer if you can.
25 THE WITNESS: I wouldn't do it again if I

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1 had a choice. I wouldn't have done it this year if I had
2 a choice.
3 BY MR. PELTZ:
4 Q. In other words, it is just almost hard to make
5 any money at that 13?
6 A. Absolutely.

7 Q. Especially if you don't own your plane?
8 A. Absolutely.
9 Q. Okay. I got you.
10 Did you agree to raise your prices up to
11 that 15 price then?
12 MR. LEACH: Object to the form of the
13 question.
14 THE WITNESS: I was the one -- it was my
15 idea. I was the one that was trying to get Mike to raise
16 his prices to 15. Again, we cater to different markets.
17 We always cater to the -- let's call them the cheap jump
18 market. If we raise the prices, then we start losing a
19 lot of business. Essentially if we raise the prices the
20 same as Larry or charging the same amount for less --
21 BY MR. PELTZ:
22 Q. Services?
23 A. Well, I wouldn't say services because we have a
24 better service, I think, but for less, you know --
25 Q. Accommodations?

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1 A. There you go.
2 Q. Accommodations?
3 A. There you go. It is a skydiving resort over
4 there. It is an awesome place. They should charge 17,
5 18, 19, and \$20. I hope they charge \$25 a jump. It will
6 be better for everybody. I mean, he charged \$125 for
7 tandems for years. We told him to raise the prices. He
8 went to 140. We told him for years, raise your prices,
9 raise your prices. You do it and everybody will follow.
10 You're the biggest guy on the block, not the smallest guy
11 on the block. So quit competing with everybody else.
12 Q. Quit competing with the small guys.
13 A. Exactly. Let me give you an example. A guy out
14 of Las Vegas does 12,000 tandems a year. 12,000 tandems a
15 year at \$220. I came to town and charged \$160 a tandem.
16 This moron in Las Vegas lowered his price to \$160. He
17 voluntarily cut his profit by \$60 because I am doing 20
18 tandems a month. Calculate how much money he lost trying
19 to compete with me who does 20 tandems a month.
20 Q. Amazing.
21 A. So that's what I am saying to Larry, "Raise your
22 prices. If you raise your prices, I will raise my prices.
23 We all want to make more money, so quit trying to compete
24 with the little guys. Be what you want. Be the skydive
25 resort and I will be the little guy and I will charge" --

1 I am going to charge close to what he does because I am
2 going to attach a different market, a more personable,
3 more face time with instructor, you know, more family
4 environment, small mom and pop stone shop type thing.
5 They're the big skydiving resort.
6 Q. Well, you said that you've had several
7 conversations with Larry Hill, and Larry Hill has told
8 you, if I am not mistaken and I don't want to put words in
9 your mouth, but words to the effect that the biggest
10 problem he has always had with this operation out here in
11 general is the fact that they charge less prices, less
12 money than he does?
13 MR. LEACH: Object to the form of the
14 question.
15 BY MR. PELTZ:
16 Q. Yes or no?
17 A. Something similar to that, that they undercut the
18 prices.
19 Q. Words to that effect.
20 That's not a one-time conversation you had
21 with him, or is it?
22 A. No.
23 MR. LEACH: Object to the form of the
24 question.
25

1 BY MR. PELTZ:
2 Q. Be fair to say that it is sort of an ongoing
3 thing that you guys have talked about off and on during
4 the time that you owned this business?
5 MR. LEACH: Object to the form of the
6 question, leading.
7 THE WITNESS: No. Probably more before I
8 owned it, before.
9 BY MR. PELTZ:
10 Q. Oh, before you owned the business?
11 A. Right.
12 Q. So his biggest complaints about the prices came
13 when Mike Mullins was running it?

14 MR. LEACH: Object to the form of the
15 question.
16 THE WITNESS: He made the statement -- and I
17 don't know whether it is true or not, but he would make
18 the statement that it doesn't have to do with Mike
19 Mullins. If Mike Mullins came and charged \$17 a jump, he
20 wouldn't care.
21 BY MR. PELTZ:
22 Q. Well --
23 A. I believe that to be true, but the thing about it
24 is, back to what I said, who would come jump Mike Mullins
25 King Air for \$17 if they can go over there and jump -- you

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1 know, there's certain people that would. It wouldn't be
2 the numbers that we're looking for.
3 Q. Okay. And that was before you bought the
4 business?
5 A. Correct.
6 Q. Well, when everybody in the industry gets
7 together and decides to set the prices, isn't that what
8 you call price fixing?
9 MR. LEACH: Object to the form of the
10 question.
11 THE WITNESS: If everybody in the industry
12 gets involved. I don't know what the law is and all that,
13 but certainly in skydiving, everybody talks about raising
14 prices, raise your prices, raise your prices. Everybody
15 says, yeah, raise your prices. It is better for
16 everybody. They're all still competing against each
17 other. They're a bunch of morons.
18 To make a parachute jump in Europe is \$25,
19 \$30. If you make a parachute jump in the United States,
20 it is still under \$20. Gas prices, airplane prices, and
21 insurances have done nothing but quadruple and jump prices
22 are the same amount.
23 BY MR. PELTZ:
24 Q. Have you ever heard Larry Hill tell you or anyone
25 else that he wanted to put Skydive -- Arizona Skydiving

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1 out of business?

2 A. No.

3 Q. Excuse me. Have you -- strike that.

4 Has Mike Mullins ever told you or have you

5 heard him tell anyone that his goal here was to try to put

6 Skydive Arizona out of business?

7 A. No.

8 Q. What about Larry Hill? Has he ever complained

9 and told you that his goal was to put Arizona Skydive out

10 of business -- Arizona Skydiving Coolidge?

11 A. No.

12 Q. And during the time that -- well, I guess when

13 Mike was operating out here under Arizona Skydiving

14 Coolidge, before you bought it, what were the months of

15 operation that he operated?

16 A. December through April.

17 Q. What happened to his customers for the rest of

18 the year?

19 MR. LEACH: Object to the form of the

20 question.

21 BY MR. PELTZ:

22 Q. Do you know whether or not he referred customers

23 to Arizona Skydiving for the rest of the year -- I mean,

24 yeah, Skydive Arizona?

25 MR. LEACH: Yeah. We should note for the

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1 record that --

2 MR. PELTZ: No. You don't have to note --

3 MR. LEACH: -- defendant's own lawyer can't

4 even keep them straight.

5 THE WITNESS: Yeah, they do. Absolutely.

6 Just to go back a little bit, when I took over this place,

7 I had so many small drop zone people come here and they --

8 it has surprised me. I talked about this with the City

9 today. It surprised me that they knew that I worked for

10 Larry for eight years and they came and said how much they

11 hated Skydive Arizona, how it was just a big place, and it

12 is a mill, a tandem mill, and it is this, that, and the

13 other thing. I would look at them and I am like, I can't

14 believe you're telling me this. I am friends with Larry

15 and I worked there for this long and you're telling me

16 this.

17 But then those -- my question back to them

18 was, have you ever jumped there, and they answered most of

19 the time no. A lot of times they would jump here for a

20 while and then we would -- I won't say talk them into it,

21 but a lot of times they would jump with us into the bar.
22 They would eventually go jump at Skydive Arizona and like
23 it, but initially as a small-time jumper, they have this
24 small mentality.
25 It is us and them mentality. It just

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1 happens in any business. You know, McDonald's is better
2 when you work for them. When you work for Wendy's,
3 McDonald's sucks. But they go over there and then they
4 realize that they like it. The jumpers are all the same.
5 You know, initially when they start jumping,
6 wherever they start jumping, they want to jump only there
7 and then they get a few more jumps and they open their
8 eyes a little bit more and they go to other places. You
9 know what? They're not bad guys over there. They're not
10 bad guys over here.
11 We're all skydivers. We can go to other
12 places and be fine. Each place has its own personality
13 and its own agendas. You decide based on what experience
14 level you are or what avenue of the sport you're
15 interested in or which place fits best for you.
16 BY MR. PELTZ:
17 Q. Did you tell Larry Hill when you first started
18 negotiating to purchase this place?
19 A. Yes, I did.
20 Q. The very first time you ever considered buying
21 it, you talked to Larry Hill about it?
22 A. Yes, I did.
23 Q. And I wanted to know some other things. I want
24 to show you what's been marked as Exhibit No. 3 and ask
25 you if you recognize that?

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1 A. I do.
2 Q. What is it?
3 A. It is a sign that I shouldn't have put up. I ran
4 out of fencing and per our agreement, I shouldn't have put
5 that up. I ran out of fencing so to keep somebody -- my
6 airplane was parked right behind there, so I put that up,
7 I don't know, a couple of months ago to prevent people --

8 we had an incident where somebody drove on the tarmac
9 before that fence was there and struck one of our
10 airplanes.
11 I put up fencing. I ran out of fence, and
12 as a temporary thing I put that up. That used to be up in
13 the hangar. Then when we signed our agreement, I took it
14 down. Then I put the fencing up and I needed something.
15 I thought, well, I will just string this up.
16 Q. Somebody actually drove on the tarmac and hit one
17 of your marked planes?
18 A. Yes. Middle of the night. They didn't have
19 their lights on. Hopefully, now they will hit the fence
20 or the sign or something.
21 Q. Was this the sign that was above the manifest --
22 A. Yes, it is.
23 Q. -- during the time you were first operating?
24 Here's Exhibit 4. Can you tell me what that
25 is.

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1 A. That's the sign that used to be over here on the
2 east side of the hangar.
3 Q. And how long was that there?
4 A. I don't know. A couple years, I guess. I took
5 it down --
6 Q. When did you take it down?
7 A. May, June, July, sometime.
8 Q. And last, Exhibit No. 5 looks like maybe the same
9 banner. I don't know.
10 A. That one used to hang from the roof, I believe,
11 over there.
12 Q. And how long was that there after you purchased
13 it?
14 A. After I purchased it? Oh, you know what? These
15 two were there all the way until January 1st.
16 Q. When you signed the agreement?
17 A. Correct.
18 Q. Okay. I think that's it for all the exhibits.
19 THE WITNESS: I am assuming you ask me a
20 bunch of questions after he is done?
21 BY MR. PELTZ:
22 Q. He can ask you any questions he has.
23 Have you witnessed any behavior by Mike
24 Mullins toward Larry Hill or Skydive Arizona that you
25 would consider unethical or wrong?

1 A. No.

2 Q. Have you ever witnessed Mike Mullins competing
3 with Larry Hill or Skydiving Arizona in any unfair way,
4 you know, anything that was unfair?

5 A. No.

6 Q. Why don't we take --

7 A. I will go get some water.

8 MR. PELTZ: Why don't we take a two-minute
9 break.

10 (The deposition was at recess from 4:29 p.m.
11 to 4:34 p.m.)

12 BY MR. PELTZ:

13 Q. When Mike Mullins was in Tennessee over the
14 summer months, do you know whether or not he referred his
15 tandem customers to Skydive Arizona?

16 A. You mean before I bought the place?

17 Q. Yeah.

18 A. Yes.

19 Q. Do you have any idea how many he would transfer
20 over there?

21 A. I don't know, no.

22 Q. Okay. Now, Marc, did you get the first notice of
23 deposition I sent setting a date sometime on the 26th of
24 March?

25 A. Yes and no.

1 Q. Okay. Well, why yes and why no?

2 A. Because I haven't been here in two weeks, so I
3 haven't checked the post office box here. I told Sid and
4 Mike, I said, "I haven't received anything from anybody."

5 When I checked the mail Saturday afternoon,
6 I got three notices from you. I didn't open any of them
7 yet. By then I saw them and, oh, there they are.

8 Q. Well, that was the first one?

9 A. Well, there were three of them. There were three
10 different postmarks on them.

11 Q. Did Mike Mullins or anyone else tell you that we
12 wanted to take your deposition on the 26th?

13 A. Yes. Both Sid and Mike did. On the 26th is
14 when --

15 Q. March. That was first one, the very first one.
16 A. When was it? When was it? Sid told me that.
17 Q. Right.
18 A. I couldn't do it because I was in active duty.
19 Q. But you couldn't do it because you were on active
20 duty, it wasn't just that you didn't want to do it, right?
21 A. Right.
22 Q. The next date that we set was --
23 A. Today.
24 Q. -- the 7th.
25 Did you tell Mike Mullins about a week or so

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1 ago or two weeks ago that you couldn't do it on the 7th
2 either, that it would have to be some other day?
3 A. I don't think so. I think I told Sid.
4 Q. You told Sid that you couldn't do it on the 7th?
5 A. Right. It might have been Mike. I don't
6 remember. I remember telling --
7 Q. One of them?
8 A. -- one of them that I couldn't do it on that day.
9 Q. But then I guess something must have happened so
10 that you could be available on this day after all?
11 A. Yes.
12 Q. What was that?
13 A. I was supposed to work -- a couple different
14 things. I was supposed to work all weekend this weekend
15 in San Diego. Then in order for me to get on the agenda
16 next Monday, I had to meet with Mr. Flatly from the City
17 today. When I told -- and so I told you guys I couldn't
18 make it and then I found out about the Flatly thing and
19 then I relayed that to the people that I work with. It
20 turns out that yesterday, when they did the practice jump,
21 they had already put in funding stuff for Chief Raymond to
22 go up there, stay the night, hotel, rental car, and all
23 that stuff to be the DZSO at the Los Angeles Dodgers
24 practice game. Which means that he could be the DZSO
25 today and -- Drop Zone Safety Officer -- and they wanted

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1 me to do that and I said sure.

2 You know, they don't ask me to work all
3 weekend very often and they really wanted me to. That
4 allows them to put the other jumper in the air. On Friday
5 night when we did the storm game, I told them I can't -- I
6 got to be in Monday morning. They said, you know what?
7 It doesn't even matter. We already have -- Don can't jump
8 anyways, so basically he would be the announcer and you
9 would be the DZSO. It wouldn't get him in the air
10 anyways. If you really have to get away, go ahead. I was
11 like, cool. Saturday morning when I arrived here I told
12 Mike, I said, "Hey, in fact, I am going to be here on
13 Monday because I have to meet with Flatly, so we can do a
14 deposition if you guys needed."
15 Q. Just so I am clear, the first time then anybody
16 would have known that you would have been available today
17 would have been Saturday morning?
18 A. Correct. I meant to call you, but I got here
19 Saturday morning.
20 Q. Did you tell Larry Hill that you were having this
21 deposition?
22 A. Today?
23 Q. Ever. That you were going to -- did you ever
24 talk about the fact that you were going to have this
25 deposition?

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1 A. Larry Hill and Sid are always the ones that want
2 me to do a deposition. I only recently found out that you
3 guys want me to do a deposition.
4 Q. Okay.
5 A. Both Larry and Mike said, "You're going to be
6 deposed. Is that okay?" I was like, "Yeah, sure." I
7 didn't have a problem with it, and then Sid is the only
8 one that I've talked to several times that said, you know,
9 "Hey, we're going to depose you. When is a good time?"
10 You know, I said, "I don't know. I will get back to you."
11 I was on active duty.
12 Q. Did Sid ever tell you that when the depo was set
13 on the 14th that you wouldn't have to show up and attend
14 at that depo?
15 A. On the 14th?
16 Q. Yeah. It was set later today, a much later, a
17 week after because originally --
18 A. I never knew anything about the 14th. Is that
19 next Monday?
20 Q. Yeah.
21 A. Okay. I said that I could do it this following

22 Friday or the following Monday.

23 Q. Right.

24 A. He said I don't have to do it then if I didn't
25 want to.

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1 Q. So he told you you didn't have to do that

2 deposition that was set on those dates?

3 A. If I didn't want to, I didn't have to.

4 Q. Did he encourage you not to do it?

5 A. I don't know if I would say that they encouraged
6 it, but he said I didn't have to. He also said that I
7 didn't have to today because I never received a subpoena.
8 Which I told Mike that and he handed me one or Joe handed
9 me one. He told me both before and after that I didn't
10 have to do it.

11 Q. So he indicated to you that you wouldn't have to
12 do the deposition either today or on the 14th, one,
13 because you didn't have a subpoena and the other one just
14 because you just didn't have to?

15 A. Correct.

16 Q. But you don't think that he encouraged you not to
17 do the deposition?

18 A. I don't know.

19 Q. What about Larry Hill?

20 A. Same thing. Said the exact same thing.

21 Q. Said the exact same thing?

22 A. Yeah.

23 Q. Did he encourage you not to do the deposition,
24 not to take this deposition?

25 A. Maybe. I kind of got the feeling. I don't know.

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1 He never said not to do it. He just said, you don't have
2 to do it if you don't want to, which I thought was unusual
3 because you guys are the ones that initially wanted me to
4 do it.

5 MR. PELTZ: Okay. That's a wrap for me.

6

7 EXAMINATION

8 BY MR. LEACH:

9 Q. When you and I had a conversation about the
10 possibility of you being deposed next Monday, did I tell
11 you that I would object to the deposition because it was
12 after the deadline for completing discovery?
13 A. I think so.
14 Q. And I told you that I would not be attending,
15 right?
16 A. I think so, yes. But I think you said the reason
17 that I didn't have to come was because it was after the
18 deadline.
19 Q. Right.
20 A. You said that I didn't have to come. You said
21 before that I didn't have to come because I didn't get a
22 subpoena.
23 Q. Right.
24 A. I thought you guys wanted me to come.
25 Q. Now, the first time that the defendant noticed

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1 your deposition, did you know that they were going to
2 require you to travel to Tucson to testify?
3 A. No. Didn't know anything about that.
4 Q. Would that have been inconvenient for you?
5 A. Yes.
6 Q. And was that the time when I told you that you
7 didn't have to attend because they didn't serve you with a
8 subpoena?
9 A. Yes.
10 Q. And that it should be at a time convenient for
11 you?
12 A. Yes. I never knew I was going to have to go to
13 Tucson. I think you were the first person -- or you were
14 the only person to ever tell me about it. I never knew
15 about it.
16 Q. Okay. Let me ask you just a couple of questions
17 about Exhibit 7. Now, the things that you thought that
18 you had some question about on Exhibit 7, it says Arizona
19 Skydiving instead of Arizona Skydiving Coolidge?
20 A. Correct.
21 Q. And it says Coolidge Skydiving instead of Skydive
22 Coolidge?
23 A. Right.
24 Q. And the first page where it says that is a page
25 that has some initials on it, right?

1 A. Correct.

2 Q. Are those your initials?

3 A. Yes, they are.

4 Q. Now, another place -- if you look at the last

5 page, this is page 5 of the agreement or it has production

6 number SA1480, that page says Arizona Skydiving and it

7 also says Coolidge Skydiving, correct?

8 A. It does. That's correct.

9 Q. And that page has your signature on it, right?

10 A. Correct. A photocopy of my signature. That's

11 correct.

12 Q. Now, when you got together with -- can you

13 explain the circumstances under which you actually signed

14 this agreement with Larry Hill?

15 A. Sitting in Larry Hill's office during the

16 Christmas Boogie.

17 Q. Was it just you and him?

18 A. Correct.

19 Q. And did Larry Hill have this -- some version of

20 this on his computer?

21 A. Yes, he did. It was all on his computer. I

22 walked in. He handed me the agreement. I looked over it.

23 I said, fix this, fix this. He turned to his computer.

24 He fixed it. He printed it out. I looked at it. I think

25 we had to fix something else, and then he handed me the

1 final one. We proofread it again and signed it.

2 Q. Okay. Other than those two terms, does Exhibit 7

3 accurately set forth the treatment that you entered into

4 with Larry Hill?

5 A. This Exhibit 7?

6 Q. Yes.

7 A. Other than just that wording -- and here's --

8 there's two reasons I know this. Number one, I am not

9 Arizona Skydiving and I never have been. Whether they

10 operated as Skydive Arizona -- or Arizona Skydiving, I

11 don't know, but I have always operated as Arizona

12 Skydiving Coolidge or even Arizona Skydiving Center

13 Coolidge. I never operated as Arizona Skydiving. Not one

14 piece of paper, not one E-mail, nothing has ever been

15 Arizona Skydiving. I immediately got on that. I am not

16 Arizona Skydiving. I was like, I am not Arizona Skydiving
17 and I am not signing that.
18 Second thing --
19 Q. But other than these terms, Arizona Skydiving and
20 Coolidge Skydiving, does --
21 A. Yes.
22 Q. -- does the agreement --
23 A. Yes.
24 Q. -- otherwise accurately set forth your agreement?
25 A. Yes.

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1 Q. So the only problem you have with Exhibit 7 is it
2 says Arizona Skydiving instead of Arizona Skydiving
3 Coolidge and it says Coolidge Skydiving instead of Skydive
4 Coolidge?
5 MR. PELTZ: Object to the form. That's not
6 what he testified to.
7 THE WITNESS: Again, back to Coolidge
8 Skydiving. I never wanted to be called Coolidge
9 Skydiving. I never was interested in being Coolidge
10 Skydiving because I think I had a phone conversation with
11 you and I know I had a conversation with Larry that said
12 this: "So all I have to do is drop Arizona and I am good,
13 so it would be Skydiving Coolidge or Skydive Coolidge?"
14 Yeah. Okay. I guess that's not a big deal. All I am
15 dropping is the state off.
16 All I have to do to the hangar is go paint
17 over Arizona. I didn't even know that it said Arizona
18 Skydiving. I didn't pay attention. All I have to do -- I
19 just never got around to do it. All these signs here
20 could be in our agreement. All I had to do is go paint
21 over the Arizona and I am fine. That was my
22 understanding.
23 That's why when I looked at that I said,
24 that's not right. Other than those two things, the
25 agreement is correct.

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1 BY MR. LEACH:
2 Q. Was it possible that Larry Hill sat there and

3 either screwed up making the changes or printed out the
4 wrong document or --
5 MR. PELTZ: Object to the form.
6 BY MR. LEACH:
7 Q. -- otherwise printed out something that was like
8 Exhibit 7 and both of you signed it thinking that those
9 two terms had been changed?
10 MR. PELTZ: Object to the form.
11 THE WITNESS: No.
12 BY MR. LEACH:
13 Q. You don't think that's possible?
14 A. No. If I had just saw this and Mike asked me
15 Coolidge Skydiving, I was like, son of a bitch. Did I
16 just put the wrong -- there's no way. Well, maybe, you
17 know. Looking at a couple different revisions. Maybe I
18 accidentally signed one that said Coolidge Skydiving. When
19 I saw it said Arizona Skydiving, I know without a shadow
20 of a doubt that I did not sign that document, without a
21 shadow of a doubt.
22 Q. Did Larry Hill ever indicate that he -- or insist
23 that you call your drop zone Coolidge Skydiving or did he
24 just indicate that if you stop using Arizona in
25 combination with Skydiving, he didn't care what else you

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1 did?
2 A. Yeah. He didn't care what else.
3 Q. Okay.
4 A. He said call it Skydive Coolidge, Coolidge
5 Skydiving. Actually, the one he said was Coolidge
6 Parachute. That's what he used to be or something like
7 that. That's what he used to be before he had it.
8 Q. He never insisted that you actually use the
9 particular term Coolidge Skydiving which apparently
10 appears in Exhibit 7 and which apparently was a mistake,
11 correct?
12 A. No.
13 Q. Now, you testified in response to questions from
14 Mr. Peltz that there absolutely was some confusion between
15 people who would sign up for a tandem jump?
16 A. Correct.
17 Q. Prior to May 15, when you purchased the business
18 from Mr. Mullins, May 15th, 2002, did you work at this
19 facility as a tandem instructor?
20 A. No. I had done a couple tandems out here before
21 because I brought them out here. In the period that I was
22 on the parachute team, we had an agreement where I could

23 bring some tandems out here way cheap. I brought people
24 out here on my own. Generally not paying customers. They
25 were -- I remember one was my wife's friend she worked

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1 with, so we did her for cheap. I did it for free. In
2 other words, no, I did not work as a tandem instructor out
3 here.

4 Q. So whether or not there was any confusion among
5 tandem students or experienced jumpers prior to May 15th,
6 2002, is that something that you would not have knowledge
7 of?

8 A. I know that people confused it prior to in Eloy,
9 but I can't say that -- people came to Skydive Arizona
10 when I worked there and thought that they were in Coolidge
11 and we jumped them.

12 Q. And that was prior to May 15, 2002?

13 A. Correct. Whether people came here and thought
14 they were Skydive Arizona, I can't say. I have no idea.
15 I can only say that since May 15th, 2002 that that hasn't
16 happened.

17 Q. Were you working here in Coolidge on February 4,
18 2002?

19 A. February 4, 2002?

20 Q. Uh-huh.

21 A. No. I worked at Skydive Arizona.

22 Q. Okay. And then after -- so before May 15, 2002
23 you knew that there were instances of confusion when you
24 were at Skydive Arizona, correct?

25 A. Correct.

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1 Q. Then after May 15th, 2002 you know there were
2 instances of confusion when you were operating here in
3 Coolidge?

4 A. Correct. If I understand what you said, I am
5 aware of the confusion both before and after, yes.

6 Q. Okay.

7 A. And I am aware that Eloy jumped Coolidge students
8 both before and after. I am not aware of any before and I
9 am positive it didn't happen after the other way.

10 Q. Okay. Now, you indicated that Larry Hill told
11 his people that if somebody showed up at Eloy by mistake
12 and they intended to be at Coolidge, his instructions were
13 to send them over here to Coolidge, corrects?
14 A. Correct. As far as I know. That's what he told
15 me.
16 Q. Okay. Now the people that you indicated who
17 jumped them anyway, was that the tandem instructors that
18 were doing that?
19 A. And the drop zone manager.
20 Q. And the tandem instructors are independent
21 contractors; is that --
22 A. Correct. They don't care. They see 25 bucks in
23 front of them. I don't blame the tandem instructors.
24 What I blame is the manager who knew damn well that they
25 weren't supposed to be there and knew damn well that they

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1 were supposed to be in Coolidge and still jumped them.
2 And who actively told them, you know, "Well, it's a
3 30-minute drive from here. You know, you're here. You
4 might as well just go here."
5 Q. Now, you're aware that Larry Hill used to operate
6 a drop zone or a skydiving business here in Coolidge at
7 this airport, correct?
8 A. Yes, I am.
9 Q. And while he was operating here in Coolidge he
10 changed the name of his skydiving operations to Skydive
11 Arizona, correct?
12 A. To my understanding, yes. I don't know it to be
13 a fact, but that's what he told me, I believe.
14 Q. And there was some period of time when Larry Hill
15 operated Skydive Arizona here at the Coolidge airport
16 before he went to Eloy?
17 A. Correct.
18 Q. Now, you testified in response to questions from
19 Mr. Peltz that around the time that you purchased the
20 business here on May 15th, 2002, that half the people felt
21 Larry Hill owned the place and you were his stooge and
22 half the people felt Mike Mullins owned it and you were
23 his stooge.
24 Do you remember that testimony?
25 A. Right. Yes.

1 Q. Do you remember that testimony?

2 A. Yes.

3 Q. When was that?

4 A. Skydivers all got their own little opinions the
5 way things are going. There was a posting -- as soon as I
6 opened I built a door here. I built a door closing the
7 hangar and painted it white. Within -- it had to be
8 within 24 hours there was a posting on the Internet that
9 said Larry Hill brought Skydive Arizona. I know this to
10 be true because there was a door put up yesterday and it
11 says Skydive Arizona on the front of it. I walked out.
12 It doesn't say Skydive Arizona anywhere. As a joke, I
13 took a pen and about that big wrote Skydive Arizona. Must
14 be true. You know, that was a big joke.

15 People just like to talk. They just run
16 their mouths. I don't know. Everybody wants the newest
17 canopy, have the newest information, have the newest
18 gossip. That's what I attribute it to. Did you hear
19 this. Did you hear that. The first one to tell you,
20 generally it is not true.

21 Q. And this message that was put out over the
22 Internet, was it rec.skydiving?

23 A. Right.

24 Q. Is that a news group that --

25 A. It is a news group that --

1 Q. -- skydivers subscribe to in exchange for
2 information?

3 A. Correct. It is a news group. Mostly it is a
4 bunch of crap. It used to be a pretty good news. People
5 would talk about good things. Now, there's a group of
6 people that basically took it over that just run their
7 mouths nonstop about whatever. Now it is not even really
8 worth much. There are other ones now, dropzone.com and
9 enclave. There are some other ones that are a little bit
10 better now.

11 Q. And the substance of the message that was put out
12 over this Internet news group of skydivers right after you
13 purchased the business was that Larry Hill had purchased
14 this business?

15 A. Correct.

16 Q. So there were rumors going around that this

17 Coolidge skydiving operation was affiliated with Larry
18 Hill's operation at Skydive Arizona; is that right?
19 A. Correct. And to be fair, I would say that we
20 were affiliated with them. We took his jump tickets. We
21 were flying his airplane. We had arrangements. Sure.
22 That's exactly what I wanted. I did not
23 want to be Larry Hill's enemy. He is a friend of mine.
24 That's the whole reason I asked him before I bought this
25 place if I should buy it. I told Mike, whenever Mike and

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1 I sat down and talked about this, I said, "I am going to
2 ask Larry before I do this." He said, "He's going to say
3 no." I said, "No. We're friends. I think he is going to
4 be okay with it."
5 Now all those -- as I said, all that market
6 of small jumpers that won't come to Skydive Arizona
7 because it is too big will come to Coolidge. They won't
8 go to Skydive Arizona.
9 Now, in effect, he is getting both places.
10 It is my operation, but I am using his aircraft. I can
11 use whatever aircraft I want, but I would rather use his
12 because they're 11 miles away. He is a friend of mine.
13 We can do business together and I have a capacity to grow.
14 If I get a big day I can say, "Hey, don't
15 send the Porter, send the Otter." So, yeah, I would say
16 we're affiliated. Larry, I think, was fine with that. He
17 sanctioned it as far as I'm concerned. When Mike Mullins
18 operated here independently, it was very well known that
19 that's probably not a good idea to go jump over there if
20 you work here. When I owned it, it was a little more well
21 known that it is okay. It is Marc Hogue. It is okay.
22 Larry's all right with it.
23 I specifically had many conversations with
24 Larry telling his minions like quit jumping my students
25 and tell people it is okay. I don't want you telling

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1 people they can't jump here.
2 Q. Did the name Arizona Skydiving Coolidge and
3 whatever similarity it may have to Skydive Arizona enhance

4 the impression that the two drop zones were affiliated?

5 MR. PELTZ: Object to form, calls for

6 speculation.

7 THE WITNESS: I don't think so.

8 MR. MULLINS: Withdraw his objection.

9 THE WITNESS: The name was there before. To

10 be honest with you, no experienced skydiver -- they don't

11 give a shit what the name is. We can change the name ten

12 times. It is Coolidge and Eloy. Nobody calls Eloy

13 Skydive Arizona. Everybody calls it Eloy. Where are you

14 going. I'm going to Eloy. I mean, it is location.

15 Nobody knows them by the correct names.

16 BY MR. LEACH:

17 Q. Now, when you put stickers on the aircraft that

18 Larry Hill was having you use, the Porter, initially you

19 put some stickers on the paint where it says Skydive

20 Arizona on the exterior of the aircraft?

21 A. We put them certain places inside and out.

22 Inside when you do tandem videos because you get shot

23 inside. I wanted it specifically to say, you know,

24 Arizona Skydiving Center Coolidge is what it says. I

25 wanted them to have it on video. The video is a selling

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1 tool. They take it to their friends and we take still

2 pictures of it too. They take it to their friends. It is

3 the same as putting it on the helmets. It is there. It

4 is ever present.

5 We put them all on the inside and we put it

6 on the strut. One of my instructors said, "Hey, let's put

7 one right on the strut, that way as you're climbing out

8 the airplane looking three miles down, it is right there

9 in front of you." I was like, "Hey, that's a good idea."

10 A couple days later, a week later they're

11 like, "Hey, it came back. It peeled off. Don't put it on

12 the paint. We don't want it on the paint."

13 Q. The objection was that it might damage the paint?

14 A. Exactly. They said straight out, "You can go out

15 and get some vinyl letters and put them wherever you want

16 on the airplane, but don't put the stickers on the paint.

17 You can put vinyl because it comes on and off."

18 Q. If you had not put those stickers of the place of

19 business, would it be some possibility that the students

20 or people watching the video might think that it had

21 occurred or was somehow connected with Skydive Arizona?

22 MR. PELTZ: Object to the form, calls for

23 speculation.

24 THE WITNESS: Yes. That's why I did it.
25

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1 BY MR. LEACH:

2 Q. Now, in connection with your leasing aircraft,
3 you talked about the Cessna that you leased from Tom
4 Talbot and you related some prior history for Skydive
5 Phoenix.

6 Do you recall your testimony to the fact
7 that Skydive Phoenix used to be called Arizona Air Sports?

8 A. Correct.

9 Q. Do you know what the legal problems were that
10 caused them to change their name?

11 A. I am not sure which one it was. There was a
12 tandem fatality involved with Tim Tucker's mother.
13 Basically he killed his own mother on a skydive. There
14 was a broken leg that went to litigation and there was --
15 I believe there was some litigation over Keith Westbay
16 when he went on the sky surf.

17 Tom didn't have the safest record in the
18 world. He was green beyond years a lot and -- but he
19 wasn't smart enough to know it. He had a lot of problems.
20 I can't even say 100 percent sure that that is why he
21 changed his name, but it is because, man, it was smart
22 about changing to Skydive Phoenix. He got a ton of
23 business because he had a Mesa address. Oh, he is right
24 here in Mesa, which he is just as far as everybody else,
25 but gave the impression that he is right there in town and

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1 everything else is way out there in the sticks. As I
2 understand it, it was over litigation that they changed
3 the name.

4 Q. If a drop zone is not running in the skydiving
5 operations and is not conducted there with due regard to
6 safety considerations, is there a risk of -- that people
7 could get hurt or injured at the place?

8 A. Yes. But by the same token, even if you do all
9 the right things, people can still get hurt.

10 Q. But it is important to observe the basic safety

11 requirements and other things that can enhance the safety
12 of the sport?
13 A. Absolutely.
14 Q. So that the quality of the skydiving services can
15 vary from drop zone to drop zone based on the degree to
16 which they observe safety requirements?
17 MR. PELTZ: Object to the form, foundation,
18 speculation.
19 THE WITNESS: It can and does. Why? It is
20 because probably rightfully so USP has some very loose
21 guidelines and it is pretty easy to fall within them, but
22 the industry kind of dictates a little bit more.
23 You could say the hell with USP and be fine
24 if you stuck with the industry standards.
25

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1 BY MR. LEACH:
2 Q. In order to be a USPA recognized drop zone, do
3 you have to make any commitment that the drop zone is
4 going to observe the basic safety requirements that are
5 endorsed by the USPA?
6 A. Yes.
7 Q. USPA is the acronym for United States Parachute
8 Association?
9 A. Correct.
10 Q. During the time that Mike Mullins owned Arizona
11 Skydiving in Coolidge, was the drop zone a USPA recognized
12 drop zone?
13 A. No, not to my knowledge.
14 Q. Is Skydive Arizona known as a quality drop zone?
15 A. Absolutely.
16 Q. Is Skydive Arizona well known in the skydiving
17 community or market?
18 A. Yes.
19 MR. PELTZ: Object to the form, speculation,
20 foundation.
21 BY MR. LEACH:
22 Q. Is Skydive Arizona famous in the skydiving
23 market?
24 MR. PELTZ: Object to the form, speculation,
25 lacks foundation.

1 THE WITNESS: Yes.

2 BY MR. LEACH:

3 Q. How long before May 15, 2002 was it when you

4 first started your discussions with Mr. Mullins about

5 buying the skydiving operations here in Coolidge from him?

6 A. A couple weeks. It was very short. It was very

7 quick. It was an opportunity.

8 Q. And why was it an opportunity?

9 A. Because it wasn't something that I looked at. I

10 didn't come get out and say I am going to go here. When I

11 got off the parachute team and I am going to go back to

12 Skydive Arizona again until I finished my degree. It

13 should take me two semesters, one spring semester and

14 summer semester and I will be good. Then in the interim I

15 am going to work at Skydive Arizona until either my lease

16 comes through for Vegas to open a drop zone up there or

17 the Navy job which they have been trying to create for me

18 comes through. "Hey, you want to buy the drop zone dirt

19 cheap?" "Yeah."

20 Excuse me for one second. I just want to

21 tell my wife --

22 (An off-the-record discussion was held.)

23 BY MR. LEACH:

24 Q. Before you purchased the drop zone from Mike

25 Mullins, I think you indicated that you did not work in

1 Coolidge as an instructor?

2 A. Correct.

3 Q. Did you have any knowledge or information about

4 the profitability of the skydiving operation during the

5 time that Mike Mullins ran the business in Coolidge?

6 A. I am not sure what you're asking. Whether he

7 made a profit or whether I could make a profit?

8 Q. It was more historical data whether he made a

9 profit and how profitable the business had been during the

10 time that Mr. Mullins had operated it?

11 MR. PELTZ: Object to the form, foundation,

12 speculation.

13 THE WITNESS: I have no idea if he made a

14 profit. I knew how many jumps he made roughly and so then

15 I could project how much I was going to make, but I

16 couldn't tell you whether he made a profit or a loss.

17 I knew that certainly he was losing out on a

18 lot of tandems because he was gone eight months out of the
19 year.
20 BY MR. LEACH:
21 Q. Did Mr. Mullins have any discussions with you
22 about the finances or the profitability of the business or
23 give you any -- make any representations to you about how
24 the drop zone had done historically during the time he had
25 operated at Coolidge?

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1 A. He told me jump numbers, which I translated into
2 money obviously. I mean, it is not hard to figure out.
3 25,000 jumps at \$10 is \$250,000. 25,000 jumps at \$13
4 is -- what was is? \$260,000. What it cost to do that, I
5 have no idea, but I knew generally what the lease payment
6 was, how much the insurance was, that kind of stuff.
7 Q. So the information or the data that Mr. Mullins
8 gave you about the skydiving operations in Coolidge when
9 you were discussing purchasing the business was jump
10 numbers, correct?
11 A. That's correct.
12 Q. And what did he tell you about jump numbers?
13 A. That he expected to do about 20,000.
14 Q. In what time period?
15 A. During the winter when he is here.
16 Q. So the estimate you got was 20,000 jumps during
17 the period or the season that he would operate at
18 Coolidge; is that correct?
19 A. Correct.
20 Q. And refresh my recollection.
21 The period that he would operate from
22 Coolidge, would it be December through April?
23 A. Correct.
24 Q. All right. And so you did your financial
25 analysis based on multiplying the -- what you knew could

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1 be charged for a jump times the 20,000 jump number that he
2 gave you; is that fair?
3 A. Correct. Well, I would say no, not correct
4 because -- I mean, I didn't care what he made. I wanted

5 to know how much I was going to make. I did the
6 calculations on how much I was going to make, which was
7 probably stupid because I should have calculated how much
8 he was going to make.

9 Q. Have you at any time been provided with any
10 information by Mr. Mullins or otherwise about the
11 profitability of the business while he was running it
12 before you bought it?

13 A. A little bit. He gave me an idea of how many
14 tandems he made. Generally, when I was whining about not
15 making any money, he would tell me that he didn't make any
16 money because of the maintenance problems he had. He had
17 an engine go down. He had some wing problems. He had
18 some problems with airplanes in the past two years, I
19 guess.

20 Q. Did Mr. Mullins ever tell you that he figured he
21 had huge losses during any of the seasons, say, in the
22 order of \$100,000 or \$200,000 for a season?

23 A. Yes.

24 Q. When did he tell you that?

25 A. Several times. I mean, I don't know when

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1 exactly.

2 Q. When was the first time he told you that?

3 A. Probably last -- probably when we were talking.
4 I think that's when -- I think he did because when we were
5 buying the place, that was my first question. Why do you
6 want to sell it so cheap? Why is it such a deal for me?

7 His answer was, "Well, I operate two drop
8 zones. I am here four months out of the year. I pay all
9 the bills here all year long. I come here and all I want
10 to do is fly." I think he actually made the statement --
11 well, I know. He says, "I told Larry if he just lets me
12 come fly a plane over there -- you know, essentially buy
13 out your competition here. I would rather not have the
14 headache of running another drop zone and the business and
15 all that." Essentially, he was losing money, so he wanted
16 to either come to Arizona or stay in Tennessee.

17 In other words, move here permanently year
18 around or stay in Tennessee and have a drop zone there and
19 just fly here in the winter.

20 Q. What made you think that you could do better if
21 Mr. Mullins, in fact, told you he was losing money while
22 he was running the business?

23 A. Not very smart, first of all, but his losses were
24 all in the airplane. I didn't own the airplane.

25 Q. So if --

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1 A. If I lease an airplane -- this is my little pea
2 brain thinking here. If I don't have all those expenses
3 and I just lease the airplanes, then I don't have a
4 problem. You know, the old floats or flies, then lease
5 it, don't buy it. I was like, yeah, great. I will just
6 lease it and then I won't have all the maintenance
7 problems.

8 That's not true. You should own your own
9 equipment because then you're building equity into your
10 own business instead of building equity into somebody
11 else's business.

12 Q. One advantage of the arrangement you had where
13 you pay a certain amount per slot and someone else
14 provides the aircraft is that you don't have to incur
15 expenses if the plane breaks down --

16 A. Correct.

17 Q. -- or if it needs a new engine and so forth?

18 A. Exactly. I can't afford a Turbine aircraft.

19 Q. When you got this 20,000 jump figure from
20 Mr. Mullins and you were thinking about buying the
21 business, did you then make some projections over how many
22 jumps you felt you could do using this as a guideline?

23 A. For the rest of the year?

24 Q. Yeah.

25 A. Not really because I wasn't after the jumps. He

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1 is after the jumps. He owns an airplane. I am after the
2 tandems.

3 Q. So how did you -- can you tell me how you went
4 about in your mind thinking about how you were going to
5 make money or what you were projecting or thinking when
6 you were buying the business and what data you had?

7 A. Really based off Eloy. I did the numbers in Eloy
8 for a long time and there -- for a long time they were
9 doing 400 tandems a year. He gave me the numbers. He was
10 doing 300, 350 tandems during his season and that was with
11 very little advertising, so I projected that if I could

12 get, you know, 100 tandems a month, that -- you know, that
13 would more than pay for everything.

14 Q. So it was more of an estimate on number of
15 tandems that you could do that was more important?

16 A. I don't own the airplane, so I don't make -- I
17 make dollars per slot out of his airplane. I made \$3 out
18 of Larry's airplane and, again, there's that bell curve
19 where the more money I make, the less jumps people make,
20 you know -- or the less I make, the more they -- you know,
21 if my cut is smaller, then they're going to make more
22 jumps. I haven't achieved in either -- that whole curve
23 needs to be higher to make it on jumps. You're not going
24 to make it jumps. You're going to make it on tandems.
25 This is something I try to explain to my partner. If you

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1 don't make that minimum number, it is all not making it.

2 Q. So in terms of the profitability of the business,
3 you would say that the tandem students are the significant
4 part and the experienced jumpers are -- you can't really
5 make it on them?

6 A. Without me owning my own airplane, absolutely. I
7 could not make it without the tandems. If I own my own
8 airplane, then, yes, to a degree. Not fully, but
9 absolutely with the student jumpers. Time flies when
10 you're having fun, doesn't it?

11 Q. In connection with this agenda item on the city
12 council of Coolidge where you still have to get the lease
13 signed over to you, do you anticipate that Mr. Mullins is
14 going to be participating in the city council meeting?

15 A. In what respect?

16 Q. In any respect.

17 A. Yeah. I think he is going to come with me and be
18 there and tell the council face-to-face, "Transfer it into
19 his name."

20 Q. Okay.

21 A. I think so. He has indicated that to me in every
22 way.

23 Q. And will he be to some extent vouching for you to
24 the City of Coolidge?

25 A. Yes. In fact, he said he would take care of it.

1 Q. Prior to the time that you purchased the business
2 on May 15, 2002, did Arizona Skydiving Coolidge have a
3 website?

4 A. Yes, it did.

5 Q. Was the -- you are -- or was the locator
6 www.arizonaskydiving.com?

7 A. Yes, it was.

8 Q. So the www.arizonaskydiving.com was a domain name
9 that had been originally obtained by Mr. Mullins?

10 A. Correct.

11 Q. So as part of the deal in your purchasing the
12 business, the domain name was transferred over to you?

13 A. Correct. And again, in an effort to separate the
14 new management from Mike Mullins -- that website was Mike
15 Mullins's website. In an effort to say, you know, this
16 isn't Larry's, this isn't Mike's, this is just a new drop
17 zone that caters to both fun jumpers and tandems alike, a
18 smaller atmosphere, to try to put on a new image, so to
19 speak, we changed the website. That was an expensive
20 lesson too.

21 Q. On occasions when you took people over to Skydive
22 Arizona when you didn't have a pilot over here and jumped
23 your students out of the aircraft over it Eloy at the
24 Skydive Arizona facilities, did you go to any special
25 effort to explain to the students that you were not

1 affiliated with Skydive Arizona?

2 A. No. I actually did the opposite. I said that we
3 had an arrangement, that I leased airplanes over here in
4 cases where we didn't have enough business. I can only
5 think of twice that that actually happened.

6 It wasn't necessary that I didn't have a
7 pilot. Sometimes it was just that it wasn't worth
8 bringing an airplane all the way over there. It made more
9 sense for us to go over there. Like I said, I can only
10 remember it happening twice. I just told them, you know,
11 we have an arrangement, rather than the airplane come over
12 here, we're just going to go over there and jump over
13 there. I am sorry for the inconvenience.

14 Q. You indicated on some occasions the experienced
15 jumpers here at Coolidge would board an aircraft here, fly
16 over to Eloy, and jump out of the aircraft over Eloy to go
17 to the bar or the restaurant at the end of the day,
18 correct?

19 A. Correct. Again, when I took this place over
20 Paris and El Sinore used to be the drop zones. They used
21 to do that all the time. They used to have where you left
22 Paris and went back and forth and back and forth. That's
23 one of the things that I wanted to do. Hey, you know,
24 leave his personality out of it. Leave Larry Hill's
25 personality out of it and let the drop zones be drop

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1 zones. People were like, well, don't want to jump at
2 Mike's place because Larry is going to be mad. Well, I
3 don't want to jump over at Larry's place because Mike's
4 going to be mad. That type of stuff. I wanted all that
5 stuff to go away and it just be two drop zones. People
6 can go to the two places and have a good time. They offer
7 different things to different people.

8 Q. So the point I am getting at is, the Skydive
9 Arizona facilities and the Coolidge facilities are located
10 approximately 11 aeronautical miles from each other?

11 A. By air, correct.

12 Q. When you take off from one airport, it is not
13 uncommon to see the other airport as you're climbing the
14 altitude?

15 A. It is impossible not to.

16 Q. And there are occasions when you have tandem
17 instructors who have worked or work at Skydive Arizona
18 come here to Coolidge and do tandem skydives for students
19 here, correct?

20 A. Correct. In fact, it is a big shuffle. First of
21 all, a lot of times Skydive Arizona has a dedicated staff,
22 so there's so many people that live at Skydive Arizona.
23 There's a lot of tandem instructors that live over there
24 that don't work over because there's no room for them. So
25 Joe packer over there or Joe bartender over there may also

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1 be a tandem instructor that I'll use over here on
2 occasions.

3 But additionally, there's a full-time tandem
4 instructor that works here. I was the full-time tandem
5 examiner over there. When I came over here and started

6 running this place, it opened up a slot there and
7 effectively switched. Jim Chastain worked here and worked
8 over there full-time. He took my slot, but he still comes
9 back and works for us again on occasion when he wasn't
10 working over there. Skydivers and instructors do it --
11 not for the money because the money ain't there. They do
12 it because they like to jump. They're going to jump for
13 you or for somebody else. They're going to do it as long
14 as there's no repercussions.

15 Q. So would it be possible for a tandem student to
16 go over to Skydive Arizona and see some tandem instructors
17 there and perhaps jump with them and then on a different
18 day come over here to Coolidge and see the same person and
19 perhaps do a jump with them?

20 A. Correct. And, in fact, what ended up happening
21 was when I came here, a lot of people that jumped with me
22 over there were now jumping -- several of my former
23 students were coming over here and jumping again. It
24 worked real well because Larry allowed me to jump out of
25 his airplane for free.

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1 Effective, what that did is that it gave
2 me -- I stopped doing tandems so much and did more coach
3 jumps. That one-on-one again goes back to I got to spend
4 more time with my students and give them a better service.
5 We cater to that. Our experience level over here in the
6 summertime was way, way lower than it is over there.
7 That's what they're coming over here for, to do coach
8 jumps and barbecues and fun atmosphere.

9 Q. One thing I wanted to clarify. When you were
10 asked questions by Mr. Peltz, he was asking you about the
11 purchase of the business and then you spending some money
12 on advertising and had some advertising done, this
13 conversation that you had with Larry Hill where he said he
14 didn't care.

15 You can't say that that conversation with
16 Larry Hill preceded the time when you spent whatever money
17 you initially spent on advertising?

18 MR. PELTZ: Object to the form, leading.

19 THE WITNESS: It both preceded and followed
20 because I immediately -- as soon as I bought the business,
21 I started advertising. Very foolishly I jumped in and
22 started to advertise and learned a valuable lesson.

23 You know, we had several conversations in
24 there. Nothing major, just small conversation. Then I
25 kept advertising, kept advertising.

1 BY MR. LEACH:

2 Q. But the conversations that you had were -- you
3 indicated you immediately jumped in and started
4 advertising, right?

5 A. Uh-huh.

6 Q. And that was right as soon as you bought the
7 business on May 15th?

8 A. Correct.

9 Q. When did you first have your conversation with
10 Larry where you specifically talked to him about whether
11 you will use the name Arizona Skydiving Coolidge?

12 A. I don't remember. That's why --

13 Q. Okay. You don't remember if it was before or
14 after?

15 A. It was kind of both.

16 Q. Are you in the process now of changing the name
17 from Arizona Skydiving Coolidge to Skydive Coolidge?

18 A. Yes. We had done so as of January 1st.
19 Obviously, there was some things that we still -- I got to
20 clear up the website. I got to go line through the
21 Arizona on the wall and some other places. It
22 has been a little crazy lately. I haven't completed it as
23 per our agreement.

24 Q. You said something in response to questions from
25 Mr. Peltz about tandem students having a deposit over here

1 and them not showing up?

2 A. Correct.

3 Q. How would you take a deposit? Would you take a
4 credit card number over the telephone?

5 A. Correct. Just the same as any drop zone does.
6 The same thing. When you make a reservation, we require a
7 \$25 deposit with a credit card. If you don't show up, we
8 charge it. We don't charge it unless you don't show up.
9 If you call us and say, "Hey, I want to reschedule in a
10 day or whatever" -- it is a 24-hour policy, if you do it
11 within 24 hours.

12 We have had people call up and supposed to

13 be here in ten minutes and cancel. We still didn't charge
14 it to them. It is an effort to prevent no-shows. I was
15 going to tell you a story about Vegas, but that doesn't
16 have anything to do with it.

17 Q. When you purchased the business from Mr. Mullins
18 on May 15, 2000, did he transfer a service mark
19 registration on the supplemental register for the Arizona
20 Skydiving Coolidge name at the patent trademark office?

21 A. Not to my knowledge. I think the reason that
22 that wasn't done was that there were several things that
23 were not put in my name initially because we didn't
24 want -- I can't sublease from him. That would be in
25 violation of the lease in the City of Coolidge.

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1 There were certain things that weren't
2 changed immediately because if it were, then it would be
3 subleased. He did indicate to me that when the lease was
4 changed, he was going to give that to me.

5 Q. Okay.

6 THE WITNESS: I need to go to the bathroom.

7 MR. LEACH: Sure.

8 (The deposition was at recess from 5:28 p.m.
9 to 5:31 p.m.)

10 BY MR. LEACH:

11 Q. Have you ever had anybody working here that was
12 named Nicole?

13 A. No.

14 Q. Who typically answers the phone here at Arizona
15 Skydiving Coolidge or now that I guess it is Skydive
16 Coolidge?

17 A. Stephanie.

18 Q. Stephanie.

19 Was that the case in July 2002?

20 A. No. It would be me; my wife; or one of our
21 manifestors, which would be Angie or, what is her name,
22 Melissa.

23 Q. What is your wife's name?

24 A. Dawn Rae.

25 Q. You made some mention that you were handed a

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1 subpoena at some time in connection with today's
2 deposition.
3 Did I hear that right?
4 A. Correct.
5 Q. When were you handed the subpoena?
6 A. Saturday afternoon.
7 Q. By Mr. Mullins?
8 A. By his son.
9 Q. By his son.
10 And did the subpoena require you to show up
11 and testify?
12 A. Yes. As I understand it. I was like, "What is
13 this?" I was like, well, I wasn't going to be there
14 anyway, so --
15 Q. Was the time and date of the subpoena today,
16 April the 7th?
17 A. I didn't even read it. I said okay. I put it
18 down. I can go get it if you want me to.
19 Q. Yes.
20 A. Honestly. I go, what is this? They said, "It is
21 a subpoena. Now you have been served." I go okay and I
22 put it down.
23 (Short recess taken.)
24 (Deposition Exhibit No. 8 was marked for
25 identification.)

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1 BY MR. LEACH:
2 Q. I've asked the court reporter to mark
3 Exhibit No. 8.
4 Is this a copy of the subpoena you were
5 served with --
6 A. I think so.
7 Q. -- on Saturday, April the 5th, right?
8 A. I think so. I mean, I can verify it by going out
9 and getting the other one. I honestly didn't even read
10 it. It looks like it.
11 MR. PELTZ: If you want me to verify that's
12 the one, I can.
13 MR. LEACH: Sure.
14 (Deposition Exhibit No. 9 was marked for
15 identification.)
16 BY MR. LEACH:
17 Q. And for the record, I've marked as Exhibit No. 9
18 a copy of the fourth amended notice of deposition.
19 A. I have no idea what this is.

20 Q. That's okay. It is just for the record.
21 Let me ask the court reporter to mark these
22 two items too.
23 (Deposition Exhibit Nos. 10 and 11 were
24 marked for identification.)
25

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1 BY MR. LEACH:
2 Q. Okay. Let me show you something I've marked as
3 Exhibit No. 10.
4 This is a printout of a page that appeared
5 on your website, correct?
6 A. Yes.
7 Q. Okay. And is this picture near the center of the
8 page a photograph of the Porter that you leased from time
9 to time from Larry Hill?
10 A. It looks like it, correct.
11 Q. And under the wing the aircraft has painted on it
12 Skydive -- the word Skydive Arizona, correct?
13 A. That's what I was asking, yes. It looks like it.
14 It is hard to tell on this thing, but I am sure it is.
15 Q. And that was altered on the website at some point
16 in the version shown as Exhibit No. 11, correct?
17 A. That's the same picture. I thought it was a
18 different picture.
19 Q. But the words --
20 A. Yeah. Yeah. I said we altered it.
21 Where did you get this one? Was this old?
22 Q. This was printed August 7th, 2002.
23 A. Yeah. That makes sense. Okay. Yeah. That does
24 make sense.
25 Q. Okay. And then Exhibit 11 was printed out on

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1 December 3, 2002.
2 A. Okay. Yeah. I thought that was weird. It is
3 the same picture. I thought it was one of the pictures we
4 missed when we went through and changed it.
5 Q. Can you tell me a reason why you would want to
6 change the photo so it would say Arizona Skydiving

7 Coolidge on the wing instead of Skydive Arizona?

8 A. So we're not advertising for the wrong business

9 just like we talked about before with the tandem videos

10 and pictures. I mean, you place lettering on your

11 airplane so that every time that there's picture taken of

12 the airplane in skydiving is done -- you put it under the

13 wing, under the fuselage so pictures -- or parachutes or

14 anywhere so people know where it is taken. It was our

15 effort to try to make sure it advertised us.

16 Q. Is it common in skydiving that you have skydivers

17 who have cameras and video cameras mounted to their

18 helmets?

19 A. Yes.

20 MR. PELTZ: Object to the form.

21 BY MR. LEACH:

22 Q. And do those -- is it common in skydiving that --

23 withdrawn.

24 Are people who jump with cameras or video

25 equipment attached to their helmet commonly referred to as

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1 camera flyers?

2 A. Yes.

3 Q. And is it common to have camera flyers jump out

4 on skydives for the purpose of taking pictures or video of

5 the skydive?

6 MR. PELTZ: Object to the form.

7 THE WITNESS: Yes.

8 BY MR. LEACH:

9 Q. And is it -- is having a camera flyer do a video

10 of a skydive one option that's offered to tandem students?

11 A. Yes.

12 Q. And is it common that the camera flyer will,

13 shortly after the exit, often catch the airplane in the

14 frame along with the skydivers that they're photographing

15 a video of?

16 A. Yes. As I said before, those airplane owners put

17 those stickers in strategic places so that they are

18 photographed and everybody knows whose airplane it is.

19 Q. And that just to make it clear to people who

20 don't understand how skydiving works, one thing that

21 people do in this industry is they put their name on the

22 aircraft, under the wing, on the fuselage, and so forth so

23 that it appears in the frame when camera flyers are

24 exiting the aircraft in videoing or photographing the

25 jump?

1 MR. PELTZ: Object to the form, leading, and
2 foundation.

3 THE WITNESS: Exactly. You just restated
4 what I said a few minutes ago. They're strategically
5 placed so that whenever the picture is taken -- we don't
6 take pictures from the top of airplanes. We take them
7 from underneath. The wing and underneath the fuselage is
8 where it is at.

9 MR. LEACH: Okay. I will pass the witness.

10 MR. PELTZ: I have just a few follow-up
11 questions.

12

13 FURTHER EXAMINATION

14 BY MR. PELTZ:

15 Q. So if I understand you correctly, the plane that
16 you have been jumping out here, it has Arizona Skydiving
17 actually really on -- I mean, it has Skydive -- Skydiving
18 Arizona -- has Skydiving Arizona on the wing, but inside
19 the craft and other places it has Arizona Skydiving
20 Coolidge stickers?

21 A. Correct.

22 MR. LEACH: Object to the form of the
23 question.

24 BY MR. PELTZ:

25 Q. So then this plane is going to have both names on

1 it?

2 A. Correct.

3 Q. So then if the guy in the plane -- and you said
4 that he does it expressly inside the video -- you want
5 your stickers on there.

6 When he shows the video it would say Arizona
7 Skydiving Coolidge inside the plane and on the stickers
8 and when he jumps out it would say Skydiving Arizona?

9 A. Skydive Arizona, correct.

10 Q. Skydive Arizona?

11 A. Correct.

12 Q. So the video -- of all these videos that have
13 been taken on this Platus Porter are going to quite likely

14 have both names appearing in the same video on the same
15 airplane?
16 A. Correct. Trying to minimize the amount that
17 Skydive Arizona is in the video because, obviously, we
18 don't want to advertise for another place. But we always
19 make sure there's a video shot of the Coolidge portion.
20 Q. I understand. I understand completely, but since
21 they're in strategic places, the only way to prevent it
22 would be to put a sign over the wing?
23 A. Over the part on --
24 Q. You can't do that?
25 A. Right.

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1 Q. That's high air speed up there?
2 A. We could. It was dumb. It is a nonissue -- was
3 a nonissue. Think about it. Mike's airplane here says
4 West Tennessee Skydiving. This isn't West Tennessee.
5 Actually, I brought Vegas's airplane down here and it says
6 Las Vegas Skydiving on the side of the airplane. Same
7 exact thing. It doesn't matter.
8 Q. You seem to indicate when you were talking --
9 responding to some of the questions from Mr. Leach that,
10 you know, you kind of wish this whole thing would just go
11 away. You want to be friends with both of these people
12 and that, you know, you were sort of hoping that when you
13 took over this that the animosity between Larry Hill and
14 Mike Mullins would cease.
15 Is that fair?
16 A. Absolutely.
17 Q. Did I pick that up correctly?
18 A. Absolutely. That was a very naive thought.
19 Q. You believe that most of the problem here in this
20 lawsuit really isn't about the name, but it is more about
21 the personal vent or feud that's going on between Larry
22 Hill and Mike Mullins?
23 MR. LEACH: Object to the form of the
24 question, leading.
25 THE WITNESS: Yes.

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1 BY MR. PELTZ:
2 Q. So I guess it is not -- I guess Mr. Hill's
3 dislike for Mike Mullins is not -- doesn't go unsaid?
4 A. No.
5 Q. And at some of these UPS -- what is it, US- --
6 A. USPA.
7 Q. -- USPA meetings and stuff, Larry Hill and
8 Mr. Mullins have had a few exchanges of words and they
9 don't see eye to eye?
10 A. I would assume that to be true. I can't say for
11 sure because I didn't go to the USPA meetings, but
12 absolutely.
13 Q. You mentioned that -- you were asked some
14 questions by Mr. Leach about unsafe skydiving operations.
15 Did Mr. Mullins run an unsafe skydiving
16 operation when he was here?
17 A. No. Not in my opinion, no.
18 Q. How many fatalities at Skydive Arizona?
19 MR. LEACH: Object to the form of the
20 question.
21 BY PELTZ:
22 Q. If you know?
23 A. I don't know. Been quite a few, but that doesn't
24 mean that Skydive Arizona is a bad place. The more jumps,
25 the more fatalities you're going to have. The less jumps,

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1 the less fatalities you're going to have.
2 Q. But there's been quite a few there?
3 A. Yes.
4 Q. Are those deaths known in the skydiving
5 community, do you think? I mean, are they published in
6 the Parachuters --
7 A. Yes.
8 Q. How many fatalities -- how many fatalities at
9 Arizona Skydiving Coolidge?
10 A. One.
11 Q. And when was that?
12 A. Sometime last year. December of last year,
13 November of last year. It was during the season last
14 year.
15 Q. Are you sure there was a fatality here?
16 A. Probably.
17 Q. Okay. And --
18 A. It was a Japanese girl. She did a hook turn.
19 Whether it was on purpose or not, she hit the ground at a
20 high rate of speed and it killed her.

21 Q. Was that before or after you brought the
22 business?
23 A. That was before. I had to explain that to the
24 City this morning. We had that conversation.
25 Q. Now, you said that you were working at Larry

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1 Hill's before you came out here and bought this business.
2 Did Larry Hill instruct his people then not
3 to take students that were from Arizona Skydiving
4 Coolidge? Did he tell you or any of his minions, hey,
5 when those guys come out, send them back to Coolidge or
6 did he say jump them?
7 MR. LEACH: Object to the form of the
8 question.
9 THE WITNESS: He never said anything about
10 them.
11 BY MR. PELTZ:
12 Q. He never, as far as you know, had a position one
13 way or the other?
14 A. No. No.
15 Q. Well, you know, you said that Larry tells you it
16 is only his minions that do this.
17 A. No. He didn't say that. I said it was his
18 minions.
19 Q. Well, how do you know it's his minions? You
20 aren't there when the students get there, are you?
21 A. I used to work there. I talk to the students on
22 the phone. I say, who did you talk to. Who told you
23 what.
24 Q. Right, but I mean, you don't know as you sit here
25 whether or not Larry Hill is telling his minions, do it

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1 anyway?
2 MR. LEACH: Object to the form.
3 BY MR. PELTZ:
4 Q. Jump them anyway?
5 MR. LEACH: Object to the form of the
6 question.
7 THE WITNESS: No, I don't.

8 BY MR. PELTZ:
9 Q. And, in fact, he could be saying that and that
10 could be his policy and he is just telling you that he
11 tells them not to so you won't be so upset with him.
12 Is that a possibility?
13 MR. LEACH: Object to the form of the
14 question.
15 THE WITNESS: I have seen him tell people
16 though specifically with me there not to do it, but that
17 doesn't necessarily -- he has made the comment to me
18 because I've said, well, what about so and so or so and
19 so. He said, "Don't worry about them. They work for me
20 and they listen to me." I think that if he says
21 specifically, you do this or don't do this, they will
22 listen. It is the rigmarole in between they have their
23 own little agendas.
24 BY MR. PELTZ:
25 Q. Have you made a profit since you have been

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1 operating here?
2 A. No.
3 Q. Why are you so happy about not making a profit?
4 A. I am not happy about it, but what choice do I
5 have. I have to laugh about it.
6 Q. Now, I just wanted to know -- I don't know
7 anything about airplanes, but I have been told that --
8 people have told me that parts of these planes and stuff
9 are very expensive.
10 A. Correct.
11 Q. Somebody told me that an engine for, say, a King
12 Air could cost about \$100,000 or at \$100,000, in that
13 area?
14 MR. LEACH: Object to the form of the
15 question.
16 BY MR. PELTZ:
17 Q. Do you know whether that's true or not?
18 A. No. I think about \$225,000 for an engine.
19 Q. You think it is about \$225,000 just for an
20 engine?
21 A. Correct.
22 Q. And I don't know for sure, but I've been told
23 that you have to do all kinds of expensive checks and
24 maintenances to keep your stuff -- to keep it operational
25 with the FFA, every so many hours you have to do work --

1 MR. LEACH: Object to --
2 BY MR. PELTZ:
3 Q. -- on the plane?
4 MR. LEACH: Object to the form of the
5 question.
6 THE WITNESS: Yeah. There's specific things
7 that the FFA lays out that you have to do, very specific
8 maintenance procedures.
9 BY MR. PELTZ:
10 Q. And that they go by -- I think they go by so many
11 hours on the engine, you got to do some things so many
12 more hours?
13 A. Some are by hours. Some are by calendar. Some
14 are by year.
15 Q. Okay. And those things that you have to do, do
16 you have to do them to stay qualified to keep your plane
17 legal? In other words, whether the plane needs that or
18 not?
19 MR. LEACH: Object to the form of the
20 question.
21 THE WITNESS: Correct.
22 BY MR. PELTZ:
23 Q. And those things are kind of expensive too,
24 aren't they?
25 MR. LEACH: Object to the form of the

1 question.
2 THE WITNESS: Yes.
3 BY MR. PELTZ:
4 Q. Now, you indicated that Mr. Mullins had told you
5 about some of his losses.
6 Did he tell you that he lost an engine and
7 had to replace that?
8 A. I already knew about it, but, yeah, I think we
9 said something about it. We talked about it.
10 Q. Now, when you were asked some questions by
11 Mr. Leach about what Larry Hill's previous name was before
12 when he was -- you know, when he changed -- when he had
13 operated, I distinctly got the impression that you only
14 know anything about that because of what Larry Hill told

15 you.
16 You don't have any personal knowledge of
17 that yourself?
18 MR. LEACH: Object to the form of the
19 question.
20 BY MR. PELTZ:
21 Q. True or not true?
22 A. No. It is not true.
23 Q. Well, you said that Larry Hill told you when he
24 changed his name to Skydive Arizona out here.
25 You weren't here during that time, were you?

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1 A. No. When he changed his name, that's correct.
2 Q. That's what I am talking about. I am not talking
3 about --
4 A. Yeah. I know it as a statement of fact that he
5 owned Wild Horse West. I know for a statement of fact
6 that he owned Coolidge Parachute Center or whatever it is
7 called. Then he told me that he changed it to Skydive
8 Arizona while he was here in Coolidge. I know that it did
9 in fact happen, so --
10 Q. But you knew the fact that it happened. He
11 basically told you what he knew, but that came from Larry
12 Hill's mouth?
13 MR. LEACH: Object to the form of the
14 question.
15 THE WITNESS: In fact, it was called
16 something different until he left Coolidge, then it was
17 called Skydive Arizona.
18 BY MR. PELTZ:
19 Q. I have a few more questions over this wonderful
20 agreement because I didn't understand what you were
21 saying, Exhibit No. 7. I didn't understand how this was
22 done. I thought that maybe, you know, like we do when you
23 negotiate an agreement, somebody faxes you a copy, and you
24 fax back.
25 Is that what happened when you negotiated

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1 this thing?

2 A. No.

3 Q. So I got the distinct impression that you went to

4 Larry Hill's office, you printed out a copy, you said we

5 got to make some changes, he printed another copy, maybe

6 even printed two copies, and when you left that office you

7 had signed the final agreement; is that correct?

8 A. Somewhat. I went the first time to his office

9 and we looked at the agreement. I said, yeah, yeah, yeah,

10 yeah, yeah. No problem. No problem. The website, I am

11 not giving up.

12 Q. Okay.

13 A. The original things. He printed out a copy that

14 said -- let me finish -- that the website was going to

15 him. That I couldn't use the website. I said absolutely

16 not and left with a copy. You and I talked on the phone.

17 You and Larry talked on the phone. Me and Larry talked on

18 the phone.

19 Months went by. I sent the agreement to my

20 attorney up in Minneapolis. My partner looked at it. We

21 came back again and said no. I don't care about the rest

22 of the stuff. I will do it, but I am not giving up the

23 website. They came back, compromised. Okay. Here's the

24 new agreement.

25 I flew over there at Christmastime, sat

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1 down, he printed it out. I looked at it and now I took it

2 line by line. That's when I saw Arizona Skydiving and

3 said I am not Arizona Skydiving. I am Arizona Skydiving

4 Coolidge. As long as you're changing that, I said, my

5 name ends with a C.

6 He printed a new copy. I looked at it.

7 There was some other little minor thing. I don't remember

8 exactly what it was. I just remembered there was -- they

9 were iterations and then the final one we looked. Okay.

10 Yeah. Looks good. Signed it.

11 Q. Okay. Now, when you went the very first time,

12 before you had negotiated the website change, would you

13 have looked at the contract close enough to notice whether

14 or not it had Arizona Skydiving without the Coolidge on

15 that first time? Think about it.

16 A. I think it probably did say Arizona Skydiving.

17 At that time I knew I wasn't signing the document, so it

18 wasn't that big of a deal.

19 Q. But you must have read through there some to find

20 out about the Internet site? That is on the later pages.

21 A. Correct. Actually, the way it went is the first

22 time I went over there and Larry sent -- gave me the
23 agreement and I stuck it in my back pocket and didn't look
24 at it. I flew off. That's actually how it went the very
25 first time.

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1 Q. You're a bad reader?
2 A. I will read it later and I stuck it in my --
3 Q. Why don't you look at Exhibit 7, the agreement
4 here.
5 Do you notice how like the -- you know what
6 font is, print --
7 A. Yes.
8 Q. -- type, size?
9 A. Yes.
10 Q. Do you notice that on this agreement, No. 7, that
11 as you go through it, this looks like it is a different
12 print size? Well, this almost -- this looks a little bit
13 bigger than this. Then when you flip to page 2, there's
14 at least two different sizes of print on that page.
15 Do you notice that?
16 MR. LEACH: Object to the form of the
17 question.
18 THE WITNESS: Yes, I do.
19 BY MR. PELTZ:
20 Q. And this one, page 3, looks like it has all the
21 same size to me, correct?
22 A. Correct.
23 Q. And the rest of this kind of looks the same, but
24 there's like parts in here that are just definitely a
25 different sized font?

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1 MR. LEACH: Object to the form of the
2 question.
3 BY MR. PELTZ:
4 Q. Right?
5 A. Correct. Let me actually look at that. I didn't
6 even notice that before.
7 Q. Well --
8 A. It looks like paragraphs one through seven are

9 smaller font.

10 Q. Right.

11 A. And then eight and on are bigger font.

12 Q. Did you notice whether the contract that you were

13 dealing with Larry Hill at any of these times, did you

14 notice whether the fonts were different like that?

15 A. I don't remember.

16 Q. Okay. Fair enough.

17 Now, so, as I understand it, you went there

18 one time. He had the agreement. You said, look, you got

19 to change this, this, and the website. You didn't even

20 read it. You stuck it in your pocket and said no, the

21 first time?

22 A. No. The first time I went, I went in his office

23 and he handed me the contract, or maybe I didn't go in his

24 office. He gave me the contract. I didn't read it. I

25 was like, okay, I am out of here. I stuck it in my back

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1 pocket and I took off.

2 Over the next couple weeks I perused through

3 it. He called me several times. Did you read the

4 agreement. No, I haven't even looked at it yet. Hey,

5 come on. We got to do something with this agreement.

6 Okay. Fine. I looked at it and faxed it to my partner.

7 That's when I was like, oh, the other stuff

8 is no big deal, but the website is a nonstart.

9 Q. Okay. So by the time that you had looked at the

10 agreement, okay, and the website wasn't in here, did you

11 notice whether or not at that time it had the correct

12 name, Arizona Skydiving Coolidge?

13 A. You mean the very first one I saw?

14 Q. Well, you got it and you put in your pack. You

15 went back and then Larry said, you got to look at it. You

16 got to look at it.

17 A. The very first one?

18 Q. The very first one.

19 A. I first one I believe said Arizona Skydiving.

20 Q. That's interesting to me. So by the time you did

21 have a chance to look at it, it said Arizona Skydiving

22 Coolidge?

23 MR. LEACH: Object to the form.

24 THE WITNESS: No. It said Arizona

25 Skydiving.

1 BY MR. PELTZ:

2 Q. Then you went back to see Larry Hill along with
3 changing the website problem, you already knew you had to
4 change some of those other problems?

5 A. No, because when I looked at it the first time I
6 read it and said okay, what does it say. Yeah. Okay. In
7 principle, it all sounds good. Fine. Just change that
8 and we will go.

9 When I went to his office and looked at it,
10 now, I am like, okay. We're going to go line by line
11 because I am not a lawyer. This is a settlement
12 agreement. Yes. It's a settlement agreement. Line by
13 line. Then I was perusing it. That's when I was like,
14 I'm not Arizona Skydiving.

15 Q. Okay. Okay. Just so I am straight on this
16 though.

17 There wouldn't be any copies hanging out
18 like this that had that change on it from the time that
19 you went to Larry's office? In other words, these changes
20 that should have been made on this were all supposed to be
21 made on the one single sitting when you were sitting in
22 Larry's office, right?

23 What I am saying is, you didn't like walk
24 out with three different versions of that contract, did
25 you?

1 A. Actually, I did.

2 Q. You did?

3 A. I walked out with two or three versions of it.

4 Q. Well, only one was signed?

5 A. Correct.

6 Q. And the only one that was signed to the best of
7 your knowledge had Arizona Skydiving Coolidge, your name
8 correct, it had the name that you were going to change to,
9 to Skydiving Coolidge? That's the one that you signed?

10 A. Absolutely.

11 Q. And what I am saying is all of those changes to
12 that contract were made in the short space of time that
13 you were at Larry's office?

14 A. Correct.

15 Q. He printed it out on his computer?

16 A. Correct.
17 Q. Printed another one off of his computer?
18 A. Correct.
19 Q. It wasn't like that he mailed you a copy and then
20 you mailed it back?
21 A. Right.
22 Q. It was done right there in that office?
23 A. Right. I actually made a specific -- I took this
24 copy on purpose. I took a copy that said Arizona
25 Skydiving on purpose.

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1 Q. Right. And are you going to -- why?
2 A. Because I wasn't Arizona Skydiving.
3 Q. Well, why did you want a copy -- why did you want
4 to take a copy like that?
5 A. I wanted to take a copy. I didn't want to take
6 one that was signed. That's the whole point. He tried to
7 make me sign an agreement that said Arizona Skydiving. I
8 am not Arizona Skydiving. I kept that as a matter of
9 record.
10 Q. Do you feel like it was kind of done in hopes
11 that you wouldn't notice it? I mean, like he was trying
12 to sort of dupe you into signing that one?
13 MR. LEACH: Object to the form of the
14 question.
15 BY MR. PELTZ:
16 Q. Or trick you into signing that one?
17 MR. LEACH: Same objection.
18 THE WITNESS: I don't know.
19 BY MR. PELTZ:
20 Q. You thought -- apparently you thought enough
21 about it to take a copy of that?
22 A. Right.
23 Q. Okay. Now, would you be so good as to promise me
24 that the contract that you have that was signed -- would
25 you send that to me at your earliest convenience or fax it

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1 to me?
2 A. I will.

3 Q. Okay. The copy of it. Just a copy. Just take a
4 photocopy and send it to me.

5 A. The great Easter egg hunt begins.

6 MR. PELTZ: And that's it for me unless you
7 have anything?

8 MR. LEACH: Will you send me a copy as well?

9 THE WITNESS: Yes.

10 MR. LEACH: If he didn't send you one, I
11 would.

12

13 FURTHER EXAMINATION

14 BY MR. LEACH:

15 Q. Is your testimony -- did you ever -- withdraw.

16 Look at Exhibit 7. The first page has a
17 line drawn through the date December 4, 2002, correct?

18 A. Correct.

19 Q. And --

20 A. You know what?

21 Q. And that was the case on the one you signed?

22 A. I just remembered something. The reason it says
23 December 4th is because I was at 300 Way and that is when
24 he gave me the first copy was at 300 Way. I got on the
25 airplane and flew back over here at the end of the day and

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1 they gave it to me.

2 As a matter of fact, I think they -- if I
3 remember correctly -- that's right. They were calling me
4 to manifest -- where the hell was I? They were calling
5 me. Larry is in his office waiting for you. I went in
6 there. He is like, here's this. I said, okay, got to go.
7 I grabbed it and took off. I went on the airplane and
8 stuck it in my bag and flew over here. It was a couple
9 weeks later --

10 Q. That's not my question.

11 A. I know what your question is. That's why it says
12 December 4th. So January 1st, when we signed it, I said
13 that's not the appropriate day and he said, well -- I was
14 like, I don't want to sign it. He just said put a line
15 through it and initial it.

16 Q. Is that what you did on the final copy that you
17 signed?

18 A. Yes, it is.

19 Q. All right. So there was only one copy that you
20 signed and that copy had the date December 4, 2002 struck
21 through and the date 1 January 2003 in with initials
22 besides it?

23 A. Correct.
24 Q. And these are your initials on the first page of
25 Exhibit 7, correct?

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1 A. Yes, they are.
2 Q. All right. And if you look at the last page of
3 Exhibit 7, was there only one copy of this agreement that
4 you signed as indicated on the last page of Exhibit 7?
5 A. Correct.
6 Q. You never signed some draft and then you said,
7 oh, no, let's not do that?
8 A. No.
9 MR. LEACH: All right. No further
10 questions.
11 MR. PELTZ: It is a wrap.
12 MR. LEACH: I've got another question, I am
13 sorry. One additional question.
14 BY MR. LEACH:
15 Q. Would you characterize Larry Hill as a computer
16 wizard?
17 A. No.
18 Q. Is he somewhat computer illiterate?
19 MR. PELTZ: Object to the form.
20 THE WITNESS: I wouldn't say he is
21 illiterate, but --
22 BY MR. LEACH:
23 Q. He is not the world's greatest at doing documents
24 on the computer?
25 A. I wouldn't know.

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1 MR. PELTZ: Object to the form.
2 THE WITNESS: No. He is not a wizard. I
3 would say that much.
4 MR. LEACH: All right. No further
5 questions.
6 (The deposition concluded at 6:02 p.m.)
7
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9

MARC HOGUE

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1 STATE OF ARIZONA)
)
2 COUNTY OF MARICOPA) ss.

3 BE IT KNOWN that the foregoing deposition
4 was taken by me pursuant to stipulation of counsel; that
5 I, Amy E. Stewart, a Certified Court Reporter in the State
6 of Arizona, and by virtue thereof authorized to administer
7 an oath; that the witness before testifying was duly sworn
8 by me to testify to the whole truth; that the questions
9 propounded by counsel and the answers of the witness
10 thereto were taken down by me in shorthand and thereafter
11 reduced to print by computer-aided transcription under my
12 direction; that the foregoing 158 pages are a full, true
13 and accurate transcript of all proceedings and testimony
14 had and adduced upon the taking of said deposition, all to
15 the best of my skill and ability.

16 I FURTHER CERTIFY that I am in no way
17 related to nor employed by any of the parties hereto nor
18 am I in any way interested in the outcome hereof.

19 DATED at Phoenix, Arizona, this 7th day
20 of May, 2003.

21
22
23
24
25

AMY E. STEWART
Certified Court Reporter
Certificate No. 50462